

DISENTANGLING CONCESSIONS TO HUMAN
FRAILTY: MAKING SENSE OF ANGLO-AMERICAN
PROVOCATION DOCTRINE THROUGH
COMPARATIVE STUDY

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I. OVERVIEW

The island of Jersey, a forty-six square mile British Crown dependency located off the coast of Normandy, may seem an unlikely origin for an exploration of Anglo-American provocation doctrine. Nevertheless, the story of *AG for Jersey v Holley*¹ is a fitting point of departure for this Note.

Dennis Peter Holley and his girlfriend, Cherylann Mullane, were alcoholics living together in the St. Helier parish of Jersey.² They regularly drank to excess and shared a tempestuous relationship given to frequent altercations.³ On April 13, 2000, Holley and Mullane met in the morning at a bar where they drank heavily and argued with one another.⁴ An hour later, Holley left to go home, where he spent the afternoon chopping wood and drinking. Mullane spent the afternoon at the public house, where she drank until returning home at approximately 5:15 in the evening. Both were drunk.⁵

Upon entering their home, Mullane told her boyfriend that she had just had sex with another man. When Holley picked up his ax to leave and resume chopping wood, Mullane told him, "You haven't got the guts." Holley did in fact have

1. [2005] UKPC 23, [2005] 2 AC 580. This Note cites a number of British and Commonwealth cases, the formatting of which adheres to the guidelines set forth in the Oxford Standard for Citation of Legal Authorities (OSCOLA). See FACULTY OF LAW, THE UNIVERSITY OF OXFORD, THE OXFORD STANDARD FOR CITATION OF LEGAL AUTHORITIES (Sandra Meredith & Timothy Endicott eds., 2d ed. 2006), available at http://www.competition-law.ox.ac.uk/published/oscola_2006.pdf.

2. *Id.* [28] (Lord Nicholls).

3. *Id.*

4. *Id.* [30].

5. *Id.* Holley's blood alcohol at the time of his arrest was more than five times the legal limit to drive. *Id.* [31].

“the guts,” which he demonstrated by lifting the ax and fatally striking his girlfriend seven or eight times.⁶

The sole issue at Holley’s trial was provocation.⁷ The prosecution’s consultant psychiatrist testified that “the killing was the result solely of the defendant’s consumption of alcohol.”⁸ Another forensic scientist testified that the defendant’s “serious chronic alcoholism was a disease and that his intake of alcohol was involuntary.”⁹ Following the deputy bailiff’s instruction to the jury that it could not consider the defendant’s drunkenness in evaluating whether a reasonable person would have responded to the provocation as he did, Holley was convicted of murder.¹⁰ This trial sent shockwaves through the English court system and ultimately undermined the very provocation doctrine under which it was tried.¹¹

Aside from its significance in the evolution of English criminal law, Holley’s case highlights a number of challenges that arise out of the modern provocation partial defense. In understanding these challenges, it is important to first recognize provocation’s place within the broader framework of Anglo-American criminal law.

At first blush, provocation is similar to self-defense. Self-defense is a complete defense allowing a nonaggressor to employ a reasonable amount of force against an individual whom he reasonably believes poses an immediate danger of bodily harm where he reasonably believes the use of force is necessary to avoid that danger.¹² Most scholars classify self-defense as a justification,¹³ meaning that it applies under circumstances in which an act that nominally violated the law was “correct behavior which is encouraged or at least tolerated.”¹⁴

6. *Id.* [30].

7. *Id.* [32]-[33].

8. *Id.* [33].

9. *Id.*

10. *Id.* [33], [35].

11. *See infra* notes 92-102 and accompanying text.

12. WAYNE LAFAVE, *CRIMINAL LAW* 539 (4th ed. 2003).

13. Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 437 (1982); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 236 (1982).

14. Robinson, *supra* note 13, at 229. The terms “justification” and “excuse” are legal terms of art and subject to slightly varying definitions depending upon whom one consults. For the purposes of this paper, I will use the

Provocation may likewise mitigate homicide where the defendant has been threatened by his victim, but it applies in a potentially far broader set of circumstances—namely where the defendant is in “a state of passion engendered in him by a” provocation which would cause a reasonable man to lose his normal self-control.¹⁵ Provocation further differs from self-defense because it is a partial defense and thus can only reduce the severity of a defendant’s crime.¹⁶

In other ways, provocation resembles the diminished capacity defense. This doctrine, sometimes called diminished responsibility, mitigates homicide where the defendant suffers from a mental condition sufficient to diminish his responsibility for the criminal act.¹⁷ Diminished capacity is an excusatory defense because its application is “personal and limited to the specific individual caught in the maelstrom of circumstances.”¹⁸ Like provocation, diminished capacity is a partial defense and cannot exculpate a defendant’s criminal act completely. The defenses differ, however, in that provocation typically requires an external triggering condition, the provoking act itself, where diminished capacity does not.¹⁹

Within this scheme the provocation defense offers an opportunity for defendants who killed as the result of a provoked

terms in accordance with the popular conception given by Professor Robinson. Under this view, recognition of a justification represents a choice not to punish (or, in the case of a partial justification, to mitigate punishment for) conduct that is otherwise criminal because the harm caused by the justified behavior “is outweighed by the need to avoid an even greater harm or to further a greater societal interest.” 1 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES*, § 24(a), at 83 (1984). An excuse, on the other hand, “represents a legal conclusion that the conduct is wrong, undesirable, but that criminal liability is inappropriate because some characteristic of the actor vitiates society’s desire to punish him.” *Id.* § 25(d).

15. LAFAVE, *supra* note 12, at 775.

16. For the sake of readability, and because I do not think it interjects confusion, I will often omit the word “partial” and refer to the “provocation defense” throughout this paper.

17. For an example of a statutory formulation of diminished capacity, see *infra* text accompanying note 48.

18. George P. Fletcher, *Excuse*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* 724, 727 (Sanford H. Kadish ed., 1983).

19. See LAFAVE, *supra* note 12, at 777-83 (outlining several categories of triggers satisfying this requirement).

emotional outburst to receive a reduced sentence.²⁰ Scholars have long struggled in neatly classifying the defense as either a partial justification or a partial excuse.²¹ Courts struggle as well in identifying precisely those emotional outbursts worthy of the defense's application. This difficulty is exacerbated in cases such as *Holley* where the defendant possesses characteristics that increase his provocablity or the probability that he will react violently. Unsurprisingly, cases sitting at the precipice of this tension are legion in modern Anglo-American provocation jurisprudence.²² In short, as the English Law Commission recently concluded, the current state of this law is "a mess."²³

This paper employs a comparative approach to bring clarity to these issues and to facilitate dialogue regarding their proper resolution. Although they share similar common law foundations, England and the United States possess myriad distinct formulations of the provocation defense. Part II presents four such formulations that are at the forefront of contemporary English dialogue. Part III presents the Model Penal Code's provision for Extreme Mental and Emotional Distress as a noteworthy American formulation of the provocation defense. Because diminished capacity is increasingly asso-

20. For a more thorough examination of the rationale behind the provocation defense, see *infra* Part V.A.

21. John Austin eloquently captured this struggle in asking:

Is [the provoker] partly responsible because he roused a violent impulse or passion in me so that it wasn't truly or merely me "acting of my own accord" [excuse]? Or is it rather that, having done me such an injury, I was entitled to retaliate [justification]?

Dressler, *supra* note 13, at 438 (citing John L. Austin, *A Plea for Excuses, The Presidential Address to the Aristotelian Society, 1956*, LVIV PROC. OF THE ARISTOTELIAN SOC'Y (1956-1957), reprinted in *ORDINARY LANGUAGE* 42 (V. Chappel ed., 1964)).

22. See, e.g., *DPP v Camplin*, [1978] AC 705 (HL); *Luc Thiet Thuan v R*, [1996] UKPC 57, [1997] AC 131; *R v Smith (Morgan)*, [2000] UKHL 49, [2001] 1 AC 146; *R v Mohammed*, [2005] EWCA Crim 1880, 2005 WL 1991642; *R v Van Dongen*, [2005] EWCA (Crim) 1728, [2005] 2 Cr App R 38; *R v James*, [2006] EWCA Crim 14, [2006] 2 WLR 887; *Fields v. Commonwealth*, 44 S.W.3d 355 (Ky. 2001); *People v. Casassa*, 404 N.E.2d 1310 (N.Y. 1980); *State v. Zdanis*, 438 A.2d 696, 700 (Conn. 1980).

23. LAW COMM'N, PARTIAL DEFENCES TO MURDER: FINAL REPORT (LAW COM. No. 290), 2004, Cm. 6301, at 29 (2004), available at [http://www.lawcom.gov.uk/docs/lc290\(2\).pdf](http://www.lawcom.gov.uk/docs/lc290(2).pdf) [hereinafter LAW COMM'N, PARTIAL DEFENCES REPORT].

ciated with provocation, Parts II and III also describe the current state and origins of the diminished capacity defense in English and American law.

The primary contribution of this paper is its depiction of an analytic continuum along which a conception of the provocation defense can be placed according to the degree of subjectivity it allows in judging the defendant's conduct. Part IV presents this continuum and explains the relative position of the five English and American formulations introduced in Parts II and III. It then illustrates that the continuum is applicable in assessing the range of cases a given formulation covers, understanding the philosophical assumptions of that formulation, and gauging the discretion each formulation affords to the jury. Finally, Part V argues that the absence of a clear rationale behind the modern provocation defense is responsible for much of the turbulence in the law's development. Specifically, it examines the mantra that the doctrine is a "concession to human frailty"²⁴ and concludes that this rationale is more likely to vex the law's evolution than it is to guide it.²⁵

24. See, e.g., John Gardner & Timothy Macklem, *Compassion Without Respect? Nine Fallacies in R. v. Smith*, (2001) Crim LR 623, 624 ("the whole idea of the defence of provocation was to make concessions to human frailty"); Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 978-79 (2002) ("The provocation defense is about human imperfection and, more specifically, impaired capacity for self-control."); *AG for Jersey v Holley*, [2005] UKPC 23, [2005] 2 AC 580 [44] (Lord Bingham & Lord Hoffmann, dissenting) ("[provocation] was a humane concession to human infirmity and imperfection"); *R v Hayward*, (1833) 6 C&P 157, 159; 172 ER 1188, 1189 ("in compassion to human infirmity"); *R v Thomas*, (1837) 7 C&P 817, 819; 173 ER 356, 357 ("anger is a passion to which good and bad men are both subject"); *R v Kirkham*, (1837) 8 C&P 115, 117, 119; 173 ER 422, 423-24 ("[the law] has at once a sacred regard for human life and also a respect for man's failings . . . though the law condescends to human frailty, it will not indulge human ferocity"); *Holmes v DPP*, [1946] AC 588 (HL) 601 ("with recognition of the effect of provocation on human frailty"); *Camplin*, [1978] AC at 713, 717 (Lord Diplock); *R v Baillie*, [1995] 2 Cr App R 31 (CA) 37.

25. It is also worth pointing out a few things that this Note does *not* do. It does not express a normative position on the substance of the English or American provocation defense. Accordingly, it does not advocate for or against any of the approaches it describes. Myriad scholarship already exists in both the American and English literature for the interested reader, much of which is referenced in this Note *infra*. Similarly, although it discusses the need for a precise rationale behind the defense, the Note does not advance a particular rationale to this end. Numerous other scholars have discussed

II. ENGLISH PROVOCATION DOCTRINE

Before delving into the evolution of English provocation doctrine, a brief overview of the English criminal court system is in order. As is the case in the United States, the English legal system is based on an adversarial model over which a judge presides to ensure accordance with rules of procedure and evidence.²⁶ The most serious criminal offenses, among which homicides are included, are classified as “indictable” offenses and are triable before judge and jury in a Crown Court.²⁷ Appeals in such cases proceed to the Criminal Division of the Court of Appeal, with the prosecution’s ability to appeal proscribed under the Criminal Justice Act 2003.²⁸ On cases that do not involve European law, a final appeal from the Court of Appeal lies to the House of Lords, a collection of nonpartisan judges distinct from the legislative body of the same name.²⁹ Only the House of Lords and the Court of Appeal have the authority to make law in England.³⁰

Following the passage of the Constitutional Reform Act 2005, a new independent body called the Supreme Court of the United Kingdom will eventually assume the existing role of the House of Lords in this judicial hierarchy.³¹ The Act, which will otherwise leave intact the English criminal process as described, had not taken effect as of the resolution of any of the cases discussed in this paper.

viable rationales, and advancing such a proposal is beyond the scope of this Note. See, e.g., Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997); Dressler, *supra* note 24. This Note seeks merely to expose, through a comparative analysis of the five approaches presented, why the given rationales for the provocation existing doctrine in England and the United States are insufficient.

26. CATHERINE ELLIOTT & FRANCES QUINN, ENGLISH LEGAL SYSTEM 237 (3d ed. 2000).

27. GARY SLAPPER & DAVID KELLY, THE ENGLISH LEGAL SYSTEM 137 (7th ed. 2004).

28. *Id.* at 160, 164-68.

29. ELLIOTT & QUINN, *supra* note 26, at 8; MARTIN PARTINGTON, AN INTRODUCTION TO THE ENGLISH LEGAL SYSTEM 55 (2d ed. 2003).

30. PARTINGTON, *supra* note 29, at 54.

31. Constitutional Reform Act, 2005, c.4, pt. 3 (Eng.), available at <http://www.opsi.gov.uk/acts/acts2005/20050004.htm>.

A. *Foundations: Common Law and the Homicide Act 1957*

The English common law origins of provocation as a partial defense to murder are ancient³² and rooted in concession to human frailty.³³ The defense is anomalous in English law in that it can reduce the nature of homicide from murder to manslaughter rather than merely affecting the degree of penalty imposed.³⁴ Its classic test at common law appears in *R v Duffy*:

Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.³⁵

This formulation contains two distinct conditions. First, the subjective condition requires that the defendant was actually provoked in such a way as to temporarily lose his self-control. Second, the objective condition requires that any “reasonable person” would have reacted as the defendant did.³⁶

Although historically based on the common law, the modern English provocation defense is rooted in statute. The Homicide Act 1957 section 3 provides the governing rule:

Where on a charge of murder there is evidence on which a jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be deter-

32. See, e.g., *Watts v Brains*, (1600) Cro Eliz 778, 78 ER 1009; *John Royley's Case*, (1612) Cro Jac 296, 79 ER 254; MATTHEW HALE, PLEAS OF THE CROWN: A METHODOICAL SUMMARY 48 (1678).

33. See, e.g., *R v Hayward*, 6 Car. & P. 157, 159, 172 Eng. Rep. 1188, 1189 (N.P. 1833) (“[W]hile smarting under a provocation so recent and so strong, that [he] might not be considered at the moment the master of his own understanding; in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only.”), cited in Alan Reed, *Duress and Provocation as Excuses to Murder: Salutary Lessons from Recent Anglo-American Jurisprudence*, 6 J. TRANSNAT'L L. & POL'Y 51, 70 (1996).

34. *DPP v Camplin*, [1978] AC 705 (HL) 713 (Lord Diplock).

35. *R v Duffy*, [1949] 1 All ER 932 (CCA) 932.

36. BLACKSTONE'S CRIMINAL PRACTICE 136 (Peter Murphy ed., 2004).

mined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.³⁷

This statutory pronouncement bears strong resemblance to the common law test. It retains the two conditions of the *Duffy* formulation³⁸ and still requires juries to assess the defendant's response to the provocation in reference to that of a reasonable man.³⁹

As interpreted by the English courts, however, section 3 has rendered at least five significant changes to the common law understanding of provocation.⁴⁰ The defense may now succeed where a third person, other than the victim, provoked the defendant.⁴¹ Words alone may now suffice to provide adequate provocation.⁴² The judge may no longer prevent the defense from going to the jury so long as there is some evidence, however slight, of provocation.⁴³ The proportionality of the defendant's response to the provocation is now only a factor, rather than a prerequisite, in assessing reasonableness.⁴⁴ Finally, the statute withdraws the power "of the judge to dictate to the jury what were to be the characteristics of the reasonable man."⁴⁵ Each of these alterations reflects the main purpose of section 3: to expand the ambit of the provocation defense by eliminating common law restrictions on its successful invocation.⁴⁶

Unlike the provocation defense, the partial defense of diminished responsibility has no basis in the English common law.⁴⁷ The Homicide Act 1957 section 2 introduced the defense:

Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was

37. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 3 (Eng.).

38. BLACKSTONE'S CRIMINAL PRACTICE, *supra* note 36, at 136.

39. Gardner & Macklem, *supra* note 24, at 634.

40. Dressler, *supra* note 13, at 429.

41. *R v Davies*, [1975] 1 QB 691 (CA) 701.

42. *See, e.g., Phillips v R*, [1969] 2 AC 130 (PC) 137.

43. *DPP v Camplin*, [1978] AC 705 (HL) 716 (Lord Diplock).

44. *R v Brown*, [1972] 2 QB 229 (CA) 234.

45. DAVID ORMEROD, SMITH & HOGAN CRIMINAL LAW 451 (11th ed. 2005).

46. Gardner & Macklem, *supra* note 24, at 631.

47. BLACKSTONE'S CRIMINAL PRACTICE, *supra* note 36, at 131.

suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.

On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.⁴⁸

The diminished responsibility defense can therefore reduce a charge of murder to manslaughter where the defendant suffered an “abnormality of mind” that “substantially impaired his mental responsibility” for the homicide. In this way it is ethically distinct from the provocation defense, in that diminished capacity provides for a partial denial of responsibility where provocation grants a partial excuse for wrongdoing.⁴⁹

English courts have interpreted the “abnormality of mind” requirement of section 2 to be considerably broader than the “defect of reason” requirement of the traditional M’Naghten test for insanity.⁵⁰ They have also liberally interpreted the Act’s parenthetical comment outlining the possible

48. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 2 (Eng.).

49. Jeremy Horder, *Between Provocation and Diminished Responsibility*, (1999) 10 King’s C.L.J. 143, 143 (delineating ethical distinction but granting that “like any significant ethical distinction, the distinction’s boundaries are contested and difficult to draw”).

50. BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 36, at 131; *see also R v Byrne*, [1960] 2 QB 396 (CCA) 403 (defining “abnormality of mind” as “a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal . . . wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment”).

causes for such abnormality.⁵¹ The “substantial impairment” requirement is viewed as “a question of degree and essentially one for the jury.”⁵² As applied through these judicial constructions, the diminished responsibility defense thus mitigates a wide range of homicides.⁵³ Due to this breadth and the relative ease of demonstrating a “substantial impairment” over a “defect of reason,” diminished responsibility has largely supplanted the insanity defense in English murder cases.⁵⁴

For the approximately fifty years since the passage of the Homicide Act 1957, English courts have focused a great deal of scrutiny on the interpretation of “reasonable” as it relates to section 3. Although the judge may no longer keep a provocation defense from the jury upon a judicial finding that a reasonable man would not have acted as the defendant did, discerning the proper means by which a judge should direct the jury as to the reasonable man test has become increasingly problematic.⁵⁵

B. DPP v Camplin: *Embracing the Ashworth Distinction*

Prior to passage of the Homicide Act 1957, the reasonable man standard was purely objective, meaning that the reasonable man could not embody any peculiarities of the defendant.⁵⁶ Simply put, the English courts refused to allow “an unusually excitable or pugnacious temperament in the accused” to create a partial defense against a murder charge.⁵⁷ This bright-line rule was easy to apply, but at times produced harsh results, including the widely criticized⁵⁸ decision in *Bedder v DPP* in which the House of Lords refused to allow a defense

51. See, e.g., *R v Vinagre*, [1979] 69 Cr App R 104 (CA) (allowing defense in case of “Othello syndrome” allegedly derived from unfounded suspicion of wife’s infidelity); Case and Comment, *R. v. Reynolds*, (1988) Crim LR 679, 679-680 (announcing that post-natal depression and premenstrual tension give rise to disease sufficient to diminish mental responsibility for murder); *R v Ahluwalia*, [1992] 4 All ER 889 (CA) 897-98 (acknowledging that “battered woman’s syndrome” can cause abnormality of mind).

52. *Byrne*, [1960] 2 QB at 404.

53. BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 36, at 131.

54. *Id.*

55. *Id.* at 138.

56. *Id.* at 139.

57. *Bedder v DPP*, [1954] 1 WLR 1119 (HL) 1123.

58. BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 36, at 139.

where the alleged provocation included taunts about the defendant's impotence.⁵⁹

In the wake of *Bedder*, the Homicide Act 1957 altered the provocation defense at common law to allow for mere words to constitute provocation.⁶⁰ It soon became evident that, given this change, it was no longer sensible to totally exclude consideration of the defendant's characteristics:

[T]he gravity of verbal provocation may well depend upon the particular characteristics or circumstances of the person to whom a taunt or insult is addressed. To taunt a person because of his race, his physical infirmities or some shameful incident in his past may well be considered by the jury to be more offensive to the person addressed, however equable his temperament, if the facts on which the taunt is founded are true than it would be if they were not.⁶¹

The challenge for the courts thus became distinguishing between, on the one hand, those characteristics of the defendant that are appropriately considered in order to give proper meaning to the Homicide Act 1957, and on the other, those characteristics that are to be ignored because they relate solely to a defendant's irascibility or pugnacity.

This challenge arose directly in *DPP v Camplin*.⁶² There the defendant, aged fifteen, was charged with murder for bludgeoning to death a middle-aged man named Kahn with a griddle pan.⁶³ Camplin's defense at trial was provocation on the grounds that Kahn had sexually assaulted him.⁶⁴ The issue on appeal was whether the trial judge properly instructed the jury that it was not to consider Camplin's age in comparing his behavior to that of a reasonable man.⁶⁵

59. *Bedder*, [1954] 1 WLR at 1121 ("[N]o distinction is to be made in the case of a person who, though it may not be a matter of temperament, is physically impotent, is conscious of that impotence, and therefore mentally liable to be more excited unduly if he is 'twitted' or attacked on the subject of that particular infirmity.") (internal quotations omitted) (emphasis added).

60. *Phillips v R*, [1969] 2 AC 130 (PC) 137.

61. *DPP v Camplin*, [1978] AC 705 (HL) 716 (Lord Diplock).

62. *Id.* at 716.

63. *Id.* at 712.

64. *Id.*

65. *Id.* at 712-13.

Reasoning that the purpose of the reasonable man test is to ascertain the “degree of self-control to be expected of the ordinary person” and that “nothing could be more ordinary than to be aged 15,” Lord Diplock’s opinion found that the accused’s age was properly imputed onto the reasonable man benchmark.⁶⁶ He went further still in holding for the Court that “the reasonable man . . . is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects *sharing such of the accused’s characteristics as they think would affect the gravity of the provocation to him.*”⁶⁷ In so doing, the Court embraced the distinction proposed by Professor Ashworth⁶⁸ two years earlier between factors that affect the severity of provocation (relevant) and those that affect only the power of self-control (irrelevant).⁶⁹ This distinction thus maintained the common law’s rigid dichotomy between the subjective and objective components of the provocation defense while giving meaning to the broadened scope of the statutory provocation provision contained in the Homicide Act 1957.

Camplin would become the guidepost for jury direction relating to the provocation defense for over twenty years,⁷⁰ during which time English courts repeatedly reasserted the Ashworth distinction.⁷¹ *R v Morhall*⁷² accentuates this distinction especially vividly. Morhall, who was high from sniffing glue, stabbed and killed his victim in response to repeated taunts related to his glue sniffing addiction.⁷³ The House of Lords

66. *Id.* at 717-18.

67. *Id.* at 718 (emphasis added). Although the Court’s opinion in *Camplin* was issued per curiam, two of five judges wrote that they agreed completely with the opinion issued by Lord Diplock, making his opinion the authoritative holding. *Camplin*, [1978] AC at 728 (Lord Fraser); *id.* at 728 (Lord Scarman).

68. *Luc Thiet Thuan v R*, [1996] UKPC 57, [1997] AC 131, 141 (postulating that Ashworth’s recommendation at least influenced the decision of the House of Lords in *Camplin*).

69. A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMB. L. J. 292, 300 (1976) (“The proper distinction . . . is that individual peculiarities which bear on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused’s level of self-control should not.”).

70. BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 36, at 139.

71. *See, e.g., R v Newell*, [1980] 71 Cr App R 331 (CA) 340.

72. [1996] AC 90 (HL).

73. *Id.* at 93-94.

ruled that the jury should have been instructed to consider the defendant's addiction in assessing Morhall's provocation defense but carefully restricted the scope of this consideration:

[A] distinction may have to be drawn between two different situations. The first occurs where the defendant is taunted with his addiction In such a case . . . it may where relevant be taken into account as going to the gravity of the provocation. The second is the simple fact of the defendant being intoxicated . . . which may not be so taken into account, because that, like displaying a lack of ordinary self-control, is excluded as a matter of policy.⁷⁴

In other words, the Court would allow imputation of Morhall's glue sniffing addiction onto the reasonable man insofar as it affected the gravity of the provocation to him, but not insofar as his intoxication made him especially excitable.

The Privy Council again reiterated the importance of the distinction in *Luc Thiet Thuan v R* where it refused to consider the effects of the defendant's organic brain damage on his ability to control himself in the face of minor provocation.⁷⁵ Of particular consequence to this paper, the Court in *Luc Thiet Thuan* refused to accept the defendant's argument that this characteristic should be assessed relative to his provocation, finding that to do so "would . . . be to incorporate the concept of diminished responsibility indirectly into the law of provocation."⁷⁶ Referring to this hypothetical incorporation as an "extraordinary result," the Court concluded it "could [not] have been the intention of the legislature."⁷⁷

C. Morgan Smith: *Particularizing the Reasonable Man*

By the late 1990s, several English high court decisions began to call into question the *Camplin* test for discerning which factors a jury should be told are relevant in affecting the power of self-control in provocation cases.⁷⁸ In *R v Smith*

74. *Id.* at 99-100.

75. *Luc Thiet Thuan v R*, [1996] UKPC 57, [1997] AC 131, 135-37, 148.

76. *Id.* at 146.

77. *Id.*

78. See, e.g., *R v Humphreys*, [1995] 4 All ER 1008 (CA) 1023 (concluding that defendant's obsessiveness and eccentricity ought to have been left to jury consideration as mental characteristics potentially relevant to provoca-

(*Morgan*),⁷⁹ this issue came to a head when the defendant, in arguing provocation to the jury, adduced psychiatric evidence that he suffered from serious clinical depression that reduced his power of self-control.⁸⁰ After the trial court refused to allow the jury to account for this characteristic when considering the objective component of the provocation defense, the Court of Appeal sought clarification and certified to the House of Lords the central question:

Are characteristics other than age and sex, attributable to a reasonable man, for the purpose of section 3 of the Homicide Act 1957 relevant not only to the gravity of the provocation to him but also to the standard of self-control to be expected?⁸¹

In a particularly complex ruling with each judge writing a separate opinion, the House of Lords answered this question in the affirmative by a three to two majority.⁸² In interpreting the Court's answer, it is therefore necessary to examine each of the three majority opinions.⁸³

tion); *R v Dryden*, [1995] 4 All ER 987 (CA) 998 (holding that characteristics that "marked off [the] appellant and distinguished him from the ordinary man of the community" should be taken into account when considering the reasonableness of his reaction to provocation); *R v Thornton* (No 2), [1996] 1 WLR 1174 (CA) 1183 (holding that medical evidence of defendant's obsessive personality disorder and "battered woman syndrome" were potentially relevant characteristics to her provocation defense); see also *Luc Thiet Thuan*, [1997] AC at 149-57 (Lord Steyn, dissenting).

79. [2000] UKHL 49, [2001] 1 AC 146.

80. *Id.* at 151-52 (Lord Slynn).

81. *Id.* at 152.

82. *Id.* at 146.

83. Lord Slynn expressed his view that the defendant's particular characteristics are relevant in assessing both whether he was actually provoked and the reasonableness of his response:

In *Camplin* it was asked in effect what could reasonably be expected of a fifteen-year-old boy. In my view the section requires that the jury should ask what could reasonably be expected of a person with the accused's characteristics. . . . [This enables] the jury to decide whether in all the circumstances people with his characteristics would reasonably be expected to exercise more self-control than he did or put another way that he did exercise the standard of self-control which such persons would have exercised. . . . The jury must ask whether [the accused] has exercised the degree of self-control to be expected of someone in his situation.

Id. at 155.

Lord Clyde similarly interpreted section 3:

Seen across these opinions, the three concurring *Morgan Smith* judges agree on at least four significant deviations from the *Camplin* model: (1) The guidance a judge is to give the jury depends heavily on the facts of the specific case; (2) invocation of the reasonable man as a reference point is no longer required; (3) whether the loss of control is sufficiently excusable is to be left entirely to the jury; and (4) the jury is now to

[T]he standard of reasonableness in this context should refer to a person exercising the ordinary power of self-control over his passions which someone in his position is able to exercise and is expected by society to exercise. By position I mean to include all the characteristics which the particular individual possesses and which may in the circumstances bear on his power of control other than those influences which have been self-induced. . . . Such characteristics as an exceptional pugnacity or excitability will not suffice. . . . This is not to destroy the idea of the reasonable man nor to reincarnate him; it is simply to clothe him with a reasonable degree of reality.

Id. at 179-80 (Lord Clyde).

The most detailed explication of precisely how trial judges should direct their juries came from Lord Hoffman:

[J]udges should not be required to describe the objective element in the provocation defence by reference to a reasonable man, with or without attribution of personal characteristics. They instead may find it more helpful to explain in simple language the principles of the doctrine of provocation. First, it requires that the accused should have killed while he had lost self-control and that something should have caused him to lose self-control. . . . Secondly, the fact that something caused him to lose self-control is not enough. The law expects people to exercise control over their emotions. . . . The jury must think that the circumstances were such as to make the loss of self-control sufficiently *excusable* to reduce the gravity of the offense from murder to manslaughter. This is entirely a question for the jury.

. . .

The general principle is that the same standards of behaviour are expected of everyone, regardless of their individual psychological make-up. In most cases, nothing more will need to be said. But the jury should in an appropriate case be told, in whatever language will best convey the distinction, that this is a principle and not a rigid rule. It may sometimes have to yield to a more important principle, which is to do justice in the particular case. So the jury may think that there was some characteristic of the accused, whether temporary or permanent, which affected the degree of control which society could reasonably have expected of *him* and which it would be unjust not to take into account.

Id. at 173-74 (Lord Hoffmann).

decide whether a particular characteristic of the defendant is considered in assessing the standard of self-control to be expected of him.⁸⁴ Although they did not reach unanimity on a precise formulation of the preferred question regarding the degree of self-control to be expected,⁸⁵ these opinions clearly establish that after *Morgan Smith*, the objective prong of the test in section 3 is open to a great deal more subjectivity than was allowable under *Camplin* and that the excusability of the accused's response to provocation is entirely a jury question.⁸⁶

The *Morgan Smith* opinions also had the profound effect of blurring the previously rigid distinction between the provocation defense of section 3 of the Homicide Act 1957 and the diminished capacity defense outlined in section 2. Prior cases, as well as the dissenting judges in *Morgan Smith*, argued vigorously that the objective prong of section 3 does not permit consideration of particular characteristics because any such relevant characteristics may be properly considered through section 2.⁸⁷ Lord Hoffmann acknowledged the theoretic legitimacy of this distinction before writing, "[t]he difficulty about the practical application of this distinction . . . is that in many cases the two forms of claim are inextricably muddled up with each other."⁸⁸ He further argued that there is often no principled means of differentiating the "ordinary person" that section 3 contemplates from the "abnormal person" of section 2.⁸⁹ Lords Slynn and Clyde similarly rejected the argument that there could be no overlap between the characteristics to

84. BLACKSTONE'S CRIMINAL PRACTICE, *supra* note 36, at 141.

85. *Compare Morgan Smith*, [2001] 1 AC at 155 (Lord Slynn) (the standard is whether the accused "has exercised the degree of self-control to be expected of someone in his situation"), *with id.* at 179 (Lord Clyde) (the standard is whether the accused "[has exercised] the ordinary power of self-control over his passions which someone in his position is able to exercise and is expected by society to exercise"), *and id.* at 173 (Lord Hoffmann) (relevant inquiry whether accused exercised "degree of control which society could reasonable have expected of *him*").

86. BLACKSTONE'S CRIMINAL PRACTICE, *supra* note 36, at 142.

87. *Luc Thiet Thuan v R*, [1996] UKPC 57, [1997] AC 131; *Morgan Smith*, [2001] 1 AC at 190-91 (Lord Hobhouse, dissenting); *id.* at 206-07 (Lord Millett, dissenting).

88. *Morgan Smith*, [2001] 1 AC. at 167 (Lord Hoffmann).

89. *Id.* at 168.

be considered in cases of provocation and diminished capacity.⁹⁰

The fundamental shift that *Morgan Smith* announced in English criminal law has, perhaps inevitably, been met with trepidation and criticism.⁹¹ As a result of the decision of the Privy Council in *Holley*,⁹² its continued viability is now imminently threatened.

Holley involved an apparently straightforward application of the decision of the House of Lords in *Morgan Smith* as it related to a chronic alcoholic's invocation of the provocation defense to mitigate the killing of his girlfriend.⁹³ Rather than set aside the defendant's conviction due to the trial court's failure to adhere to the approach approved in *Morgan Smith*, however, the Privy Council found by a 6-3 majority that the *Morgan Smith* approach itself was wrong.⁹⁴ While expressing sympathy that "the law relating to provocation is flawed to an extent beyond reform by the courts,"⁹⁵ the majority opinion never set forth a normative vision of the defense.⁹⁶ It based its holding instead on a finding that the Homicide Act 1957 bound the Court to restore the *Camplin* doctrine.⁹⁷

90. *Id.* at 156 (Lord Slynn) ("I do not consider that the existence of section 2 defining the partial defence of diminished responsibility prevents this conclusion."); *id.* at 175 (Lord Clyde) ("[I]t is not to be supposed that there is no room for some degree of overlap between the availability of both section 2 and section 3 in particular circumstances. . . . [T]he scope of the common law defence of provocation . . . should not be determined by the arrival of the distinct statutory defence of diminished responsibility.").

91. See, e.g., Gardner & Macklem, *supra* note 24, at 625 (criticizing the *Morgan Smith* decision as "superficially liberal" before outlining nine "complaints" with the judgment).

92. [2005] UKPC 23, [2005] 2 AC 580.

93. The facts of *Holley* are discussed in greater detail *supra* Part I. Note also that while *Holley* involved application of Jersey law, the Privy Council's express mention of the fact that "Jersey law on this subject is the same as English law" and of its intention to "clarify definitively the present state of English law" indicate this technicality did not shape its opinion. *AG for Holley*, [2005] UKPC 23 [1] (Lord Nicholls).

94. *Id.* [37].

95. *Id.* [27] (citing LAW COMM'N, PARTIAL DEFENCES REPORT, *supra* note 23).

96. A.J. Ashworth, *Case and Comment*, (2005) Crim LR 966, 969.

97. See *Holley*, [2005] UKPC 23 [19]-[23] (Lord Nicholls) (discussing *Luc Thiet Thuan* as a recent example of a case in which the House of Lords correctly applied the *Camplin* approach).

For those readers unfamiliar with the English court system, although the Privy Council is the ultimate judicial body for many Commonwealth countries and Great Britain's overseas possessions, its decisions do not bind English courts. As previously discussed, the court of last resort in England is the House of Lords.⁹⁸ Because those judges sitting on the Privy Council typically also sit on the House of Lords, however, Privy Council decisions are highly persuasive in English courts.⁹⁹ These decisions are especially authoritative where, as in *Holley*, all nine judges sitting on the Privy Council agreed that the majority's result definitively simplified English law.¹⁰⁰ At least one English appellate court has accepted this argument and held that the Privy Council's decision in *Holley* overruled the decision of the House of Lords in *Morgan Smith*.¹⁰¹ The final eradication of *Morgan Smith* in the House of Lords is now likely a "foregone conclusion."¹⁰²

D. *The Law Commission's Report: A Justificatory Defense*

Recognizing that the law interpreting the partial defenses provided in Homicide Act 1957 sections 2 (diminished capacity) and 3 (provocation) had become increasingly problematic in English law, the Law Commission¹⁰³ in June 2003 under-

98. See *supra* text accompanying notes 26-31.

99. SLAPPER & KELLY, *supra* note 27, at 169 ("The decisions of the Privy Council are very influential in English courts because they concern points of law that are applicable in this jurisdiction and they are pronounced upon by Lords of Appeal in Ordinary in a way which is thus tantamount to a House of Lords' ruling.").

100. See generally *Holley*, [2005] UKPC 23 [17]-[27] (Lord Nicholls) (outlining the diverging judicial views of provocation against which *Holley* was decided); *id.* [66] (Lord Bingham and Lord Hoffmann, dissenting) (acknowledging that the majority opinion more sharply delineates the provocation defense); *id.* [69], [77] (Lord Carswell, dissenting) (agreeing with the dissent of Lord Bingham and Lord Hoffman and lamenting the "patchwork of rules" constituting contemporary provocation doctrine).

101. *R v James*, [2006] EWCA Crim 14, [2006] 2 WLR 887; see also *R v Mohammed*, [2005] EWCA Crim 1880, 2005 WL 1991642; *R v Van Dongen*, [2005] EWCA Crim 1728, [2005] 2 Cr App R 38.

102. *James*, [2006] EWCA Crim 14 [43]; Ashworth, *supra* note 96, at 971 ("It is likely that anyone attempting to argue that *Morgan Smith* is still good law in England and Wales would receive short shrift.").

103. According to its website, "[t]he Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law under review and to recommend reform where it is needed." Law Commis-

took a comprehensive review of both partial defenses.¹⁰⁴ In the course of this review the Commission considered both “whether there should continue to be partial defences to murder,” and if so, “whether they should remain separate partial defences or should be subsumed within a single partial defence.”¹⁰⁵ After a little over a year of consultation and review, the Commission issued a Final Report essentially concluding that the law should retain both partial defenses and that it should retain them separately.¹⁰⁶

Though the Law Commission declined to propose any alteration to the current formulation of diminished capacity,¹⁰⁷ it explained that “the law of provocation is capable of reform in ways which would significantly improve it.”¹⁰⁸ To this end, the Law Commission formulated a concrete set of principles with which reform should accord:

Unlawful homicide that would otherwise be murder should instead be manslaughter if the defendant acted in response to gross provocation . . . ; or fear of serious violence towards the defendant or another;¹⁰⁹ or a combination of (a) and (b); and a person of the defendant’s age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way

In deciding whether a person of ordinary temperament in the circumstances of the defendant might have acted in the same or a similar way, the court

sion, Law Commission, <http://www.lawcom.gov.uk/> (last updated Oct. 7, 2005).

104. LAW COMM’N, PARTIAL DEFENCES REPORT, *supra* note 23, at 1.

105. *Id.*

106. *Id.* at 3-7.

107. *Id.* at 105.

108. *Id.* at 3.

109. Contrast this provision to the traditional formulation of self-defense given *supra* note 12 and accompanying text. To start, the fear of serious violence in the Law Commission’s provocation formulation need not be directed towards the defendant himself, but may be directed toward another person. The provocation defense also does not require that the threat be immediate or that the force used was necessary to counter that threat. Finally, the language of the Law Commission’s provocation provision makes no qualification on the force used, contrasted with the requirement for self-defense that the force used must have been reasonable.

should take into account the defendant's age and all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control.¹¹⁰

Adoption of these suggested principles would render a significant change from both the *Camplin* and *Morgan Smith* conceptions of provocation in the English law. Most dramatically, it would detach provocation from its excusatory premise that the nature of a defendant's offense should be reduced as a result of the loss of self-control.¹¹¹ It would instead operate as a justificatory defense, focusing on whether the defendant had some "moral right on his side in relation to the victim rather than simply being an example of human frailty in giving way to overwhelming anger."¹¹² Although this shift is subtle if viewed only on the wording of the Commission's suggestions, it would represent a profound departure in the way the defense would operate.

E. *The Mackay and Mitchell Proposal: Merger with Diminished Capacity*

In the wake of the *Morgan Smith* decision, Professors Mackay and Mitchell advanced a different position, namely that the majority judges in the case did not go far enough in merging the provocation and diminished capacity pleas.¹¹³ Although it embraces a vastly divergent conclusion, this proposal ironically was inspired by some of the same factors that prompted the Law Commission, including the observation that "appeals concerning the appropriate direction on provocation seem to have increased since the decision in [Morgan] Smith."¹¹⁴

Like the Law Commission, Professors Mackay and Mitchell also argued that the law should place less heavy emphasis

110. LAW COMM'N, PARTIAL DEFENCES REPORT, *supra* note 23, at 70-71.

111. *Reshaping Provocation*, (2004) Crim LR 871, 872.

112. *Id.*

113. R.D. Mackay & B.J. Mitchell, *Provoking Diminished Responsibility: Two Pleas Merging into One*, (2003) CRIM. L.R. 745.

114. *Id.* at 758-59 (citing *R v Weller*, [2003] EWCA Crim 815; *Paria v. the State (Trinidad and Tobago)*, [2003] UKPC 36).

on the concept of “loss of self-control” in these cases.¹¹⁵ In its place, the Mackay and Mitchell proposal would have the courts focus on the defendant’s disturbance of reasoning:

A defendant who would otherwise be guilty of murder is not guilty of murder if, the jury considers that at the time of the commission of the offence, he was: under the influence of extreme emotional disturbance and/or suffering from unsoundness of mind either or both of which affected his criminal behaviour to such a material degree that the offence ought to be reduced to one of manslaughter.¹¹⁶

This formulation is remarkable for the vast discretion it would place in the jury to tailor the defense to the peculiarities of the case before it.

The Mackay and Mitchell proposal reflects the authors’ view that the purported distinction between diminished capacity and provocation is unacceptable.¹¹⁷ Mackay and Mitchell view provocation and diminished capacity as excusatory defenses without justificatory persuasion.¹¹⁸ Under this view, the “extreme emotional disturbance” and “unsoundness of mind” concepts in their respective formulations accurately subsume both defenses within a single, succinct framework. Though the proposal has not achieved significant judicial or legislative traction, it has stimulated a lively conversation among English law scholars regarding the merits of such a merger.¹¹⁹

English provocation doctrine thus stands at a crossroads. The contrasting pronouncements in *DPP v Camplin* and *Mor-*

115. *Id.* at 757.

116. *Id.* at 758.

117. *Id.* at 758.

118. *See generally id.*

119. *See, e.g., id.*; J. Chalmers, *Merging Provocation and Diminished Responsibility: Some Reasons for Skepticism*, (2004) Crim LR 198; John Gardner & Timothy Macklem, *No Provocation Without Responsibility: A Reply to Mackay and Mitchell*, (2004) CRIM. L.R. 213; R.D. Mackay & B.J. Mitchell, *Replacing Provocation: More on a Combined Plea*, (2003) Crim. L.R. 219 [hereinafter Mackay & Mitchell, *Replacing Provocation*]; Susan Edwards, *Abolishing Provocation and Reforming Self-Defence – The Law Commission’s Options for Reform*, (2004) Crim LR 181. *But see* LAW COMMN, PARTIAL DEFENCES REPORT, *supra* note 23, at 69-70 (declining to consider the merger of provocation and diminished responsibility defenses on grounds of substantial opposition from consultees and incompatibility “with . . . present thinking about the way in which the defence of provocation should be reshaped”).

gan Smith reveal that the House of Lords has subjected the statutory language of the Homicide Act 1957 to vastly different exegeses. Although the Privy Council's ruling in *Holley* appears likely to foreclose the *Morgan Smith* approach as an impermissible interpretation of section 3, the House of Lords has yet to officially take this position. Commentators including Mackay and Mitchell and the English Law Commission have additionally weighed in on the current state of provocation doctrine, embracing normative visions of the defense based on complete legislative revision. Within this imbroglio are no fewer than four distinct formulations of the provocation defense, any of which could ultimately emerge as the authoritative conception of English provocation law: the *Camplin* interpretation of section 3, the particularized reasonable man of *Morgan Smith*, the Law Commission's justificatory defense, or the complete merger with the diminished capacity defense advocated by Mackay and Mitchell.

III. AMERICAN PROVOCATION DOCTRINE

A. Foundations: Heat-of-Passion Manslaughter

American conceptions of the provocation defense are rooted in the English common law and traditionally emerge under the guise of "heat-of-passion" voluntary manslaughter. Although the doctrine is subject to varying interpretations across American criminal jurisdictions,¹²⁰ the majority view "involves the intentional killing of another while under the influence of a reasonably-induced ['heat of passion'] causing a temporary loss of normal self-control."¹²¹ Like its English common law counterpart, the heat-of-passion doctrine thus contains both the subjective component that the defendant must have been in fact provoked and the objective component that the provocation would have caused a reasonable man to lose his normal self-control.¹²²

120. A minority of American jurisdictions require the strength of the passion to rise to the level of nullifying the defendant's intent to kill in order to achieve reduction to heat-of-passion manslaughter. See, e.g., *Johnson v. State*, 108 N.W. 55, 60-61 (Wis. 1906) (provocation must make defendant "incapable of forming and executing that distinct intent to take human life essential to murder").

121. LAFAVE, *supra* note 12, at 776.

122. *Id.* at 777.

While American jurisdictions are generally sympathetic to defendants who acted in the heat of passion, they are quite unwilling to allow for mental abnormalities on the part of the defendant to similarly reduce murder to manslaughter. As one American commentator notes, "the concept of partial responsibility has no place in the decision whether what has been charged as murder is actually heat-of-passion voluntary manslaughter."¹²³ This rigid separation of the two defenses derives from the belief that the objective condition of the heat-of-passion doctrine requires relating the defendant's conduct to that of a reasonable man without abnormality or mental defect.¹²⁴ Much like the view announced in *DPP v Camplin*,¹²⁵ the heat-of-passion doctrine allows for a defendant's individual characteristics to be considered in the subjective assessment of actual provocation but not in the objective determination of whether his loss of self-control was reasonable.¹²⁶

As mentioned in Part I, this paper draws on the Model Penal Code's Extreme Mental or Emotional Disturbance (EMED) provision as the American formulation of provocation to be compared with the English law formulations described in Part II. It is undisputed that the heat-of-passion doctrine and its reliance on a purely objective standard for assessing the reasonableness of the defendant's provoked response form the dominant paradigm in American law.¹²⁷ Although thirty-four jurisdictions revised their criminal codes following promulgation of the Model Penal Code, none adopted its EMED proposal completely, only five adopted this proposal "almost whole" (i.e., Extreme Emotional Distress (EED) jurisdictions), and a dozen or so adopted some of its features with "significant alterations."¹²⁸

123. *Id.* at 454.

124. *See, e.g.*, *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972); *State v. McAllister*, 196 A.2d 786 (N.J. 1964); *Taylor v. State*, 452 So. 2d 441 (Miss. 1984); *State v. Klimas*, 288 N.W.2d 157 (Wis. Ct. App. 1979).

125. *See supra* Part II.B.

126. *See, e.g.*, *People v. Rogers*, 18 N.Y. 9 (1858) (allowing consideration of defendant's intoxication in deciding whether he was in fact acting in heat of passion once it was determined that provocation at issue would have been adequate to provoke a sober man).

127. LAFAYE, *supra* note 12, at 784.

128. Sanford Kadish, *The Model Penal Code's Provocation Proposal and its Reception in the State Legislatures and Courts of the United States of America, with Comments Relating to the Partial Defenses of Diminished Responsibility and Imperfect*

Despite its sparse implementation, the Model Penal Code's concept of EMED is an appropriate model for comparison for several reasons. First, it is encapsulated within a concise statutory formulation. This makes it a convenient American counterpart to the English models, all of which are rooted in statute either in reality or by hypothesis. Second, the heat-of-passion doctrine, which is most pervasive in the United States, bears considerable resemblance to the traditional English paradigm embraced by the House of Lords in *DPP v Camplin*.¹²⁹ In contrast, the Model Penal Code formulation announces a novel construction of the provocation defense in the way it injects some subjectivity into the objective component.¹³⁰ Third, the Model Penal Code formulation is inherently tied to its view of diminished capacity in a way that facilitates discussion relative to contemporary English models.¹³¹ Due to the common law foundations of the heat-of-passion doctrine and the general absence of a diminished capacity defense in American law, such a connection between the two defenses is absent in most American jurisdictions. Because each of the English models discussed operates within a framework that incorporates a diminished capacity defense, it is most appropriate to select an American model for comparison that has also contemplated the impact of a defendant's diminished capacity.

B. *Model Penal Code: Extreme Mental or Emotional Disturbance*

Model Penal Code § 210.3(1)(b) (Manslaughter) contains the relevant provision:

[Criminal homicide constitutes manslaughter when
a] homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of

Self Defense 271, 271-72 (Feb. 2004), available at <http://www.lawcom.gov.uk/docs/Appendices.pdf> (noting that five jurisdictions omitted "mental" from Model Penal Code's proposed phrase "extreme mental or emotional disturbance" but otherwise adopted the Model Penal Code proposal whole while approximately twelve other states adopted the Model Penal Code in part).

129. See *supra* Part II.B.

130. See *infra* notes 137-40 and accompanying text.

131. See *infra* notes 148-51 and accompanying text.

such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.¹³²

This formulation is founded on the notion that provocation is an excuse,¹³³ and it renders two significant changes to the law. First, it eliminates the qualifications on how a defendant came to be disturbed that restrict the application of traditional provocation formulations.¹³⁴ In EED jurisdictions, this has broadened the latitude granted to juries and narrowed the role of the courts in provocation cases.¹³⁵ It has also greatly expanded the circumstances in which the defense can be raised by requiring jury instruction on EMED where the provocation occurred long before the defendant's homicidal response or where there was no provocative conduct at all.¹³⁶

Second, and more radically, the Model Penal Code introduces some subjectivity to the reasonableness test by allowing this assessment to be made "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."¹³⁷ By the drafters' admission, the word

132. MODEL PENAL CODE AND COMMENTARIES §§ 210.3(1)(b)-213.6 at 43 (Official Draft and Revised Comments 1980).

133. *Id.* ("for which there is reasonable explanation or excuse").

134. Kadish, *supra* note 128, at 271.

135. *Id.* at 273. This expansion of the jury's province is apparent from the wide range of evidence that courts following the Model Penal Code model have allowed defendants to present in explanation of their disturbances. *See, e.g.,* State v. Little, 462 A.2d 117, 118 (N.H. 1983) (allowing provocation defense to go to jury where defendant claimed he was upset because wife "didn't love [him] anymore" and had rejected attempts at reconciliation); State v. Reams, 616 P.2d 498, 499-500 (Or. Ct. App. 1980) (reporting that defendant offered provocation defense based on disturbance suffered when he came home to find wife had moved and all furniture was gone). *But see* People v. Mejia, 561 N.Y.S.2d 265, 265-66 (N.Y. App. Div. 1990) (refusing manslaughter instruction where defendant claimed he was provoked by a co-worker menacing him from a distance with a screwdriver because "there was insufficient evidence to support a finding that his emotional state had a reasonable explanation or excuse").

136. *See, e.g.,* People v. Casassa, 404 N.E.2d 1310 (N.Y. 1980) (allowing defense in absence of triggering event); State v. Elliot, 411 A.2d 3 (Conn. 1979) (requiring instructions on extreme emotional disturbance where defendant suffered from extreme fear of his brother); State v. Zdanis, 438 A.2d 696 (Conn. 1980) (submitting extreme emotional disturbance defense to trier of fact on basis of defendant's despair over eight-year-old niece's cancer).

137. LAFAVE, *supra* note 12, at 785.

“situation” in this context is “designedly ambiguous.”¹³⁸ The commentary to the Code makes clear that “personal handicaps and some external circumstances” must be considered while “idiosyncratic moral values” may not be.¹³⁹ Beyond this guidance, the drafters declined to offer specific advice regarding the proper scope of this subjectivity, reasoning that such a question “cannot be resolved satisfactorily by abstract definition” and should be left “to the ordinary citizen in the function of a juror assigned to resolve the specific case.”¹⁴⁰

It is worth noting at this point that diminished capacity¹⁴¹ is quite controversial in the United States.¹⁴² There is no American equivalent to the English diminished capacity codification in Homicide Act 1957 section 2,¹⁴³ and where the defense has been recognized in the United States it has been “through the judicial back door.”¹⁴⁴ In fact only five jurisdictions have allowed the defense to mitigate murder to manslaughter,¹⁴⁵ and one of these has already seen the defense repealed by popular referendum.¹⁴⁶

It is thus not surprising that the drafters of the Model Penal Code sought to distance their proposal from the diminished capacity defense:

138. MODEL PENAL CODE AND COMMENTARIES, *supra* note 132, § 210.3(1)(b) cmt. 5 at 62.

139. *Id.*

140. *Id.* at 62-63.

141. In the United States, the doctrine is also sometimes called “diminished responsibility” or “partial responsibility” and affords an opportunity for the jury to consider a defendant’s mental abnormality where it might not rise to the level of insanity in determining whether the defendant had the requisite mental state of the charged offense. Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 844 (1977) (referring to diminished capacity approach as “a diminished responsibility test in *mens rea* clothing”); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 340 (2d ed. 1995).

142. DRESSLER, *supra* note 141, at 340.

143. Kadish, *supra* note 128, at 277.

144. Stephen J. Morse, *Criminal Law: Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 24 (1984).

145. *See, e.g.*, *People v. Conley*, 411 P.2d 911 (Cal. 1966); *State v. Santiago*, 516 P.2d 1256 (Haw. 1973); *State v. Nichols*, 209 N.E.2d 750 (Ohio Ct. App. 1965); *State v. Schleigh*, 310 P.2d 341 (Or. 1957); *State v. Green*, 6 P.2d 177 (Utah 1931).

146. Cal. Penal Code § 28(b) (2006) (“As a matter of public policy there shall be no defense of diminished capacity [or] diminished responsibility.”)

[Provocation] focuses on circumstances that would so move an ordinary person to kill that the defendant's act of succumbing to that temptation, although culpable, does not warrant conviction for murder. It seeks to identify cases of intentional homicide where the situation is as much to blame as the actor. Recognizing diminished responsibility as an alternative ground for reducing murder to manslaughter undermines this scheme. Unlike provocation, diminished capacity is entirely subjective in character.¹⁴⁷

The drafters went further still in enunciating policy arguments against recognition of the defense before ultimately denouncing it:

By evaluating the abnormal individual on his own terms, it decreases the incentives for him to behave as if he were normal. It blurs the law's message that there are certain minimal standards of conduct to which every member of society must conform . . . [and] undercuts the social purpose of condemnation In short, diminished responsibility brings formal guilt more closely into line with moral blameworthiness, but only at the cost of driving a wedge between dangerousness and social control.

The Model Code does not recognize diminished responsibility as a distinct category of mitigation.¹⁴⁸

Taken on the face of this commentary, the Model Penal Code would appear to foreclose any consideration of a defendant's potentially diminished capacity in assessing his EMED defense.

A closer examination of the word "situation" as described in the commentaries and as actually applied, however, indicates otherwise. The drafters expressly intended for the EMED formulation to be "flexible enough to allow the law to grow in the direction of taking account of mental abnormalities."¹⁴⁹ Courts applying this standard have ruled consistently with this intention and have tended to accept evidence of such characteristics as relevant in assessing the defendant's "situa-

147. MODEL PENAL CODE AND COMMENTARIES, *supra* note 132, § 210.3(1)(b) cmt. 5 at 71.

148. *Id.* at 71-72.

149. *Id.* at 72.

tion.”¹⁵⁰ In this manner, the jury is asked to potentially mitigate murder to manslaughter through the EMED defense in light of the defendant’s *differences* from the ordinary person.¹⁵¹ This apparently contradicts the drafters’ express rationale for refusing to incorporate a diminished capacity defense into the Code.¹⁵²

Out of this quandary one can nonetheless draw certain safe conclusions. The Code’s EMED formulation has been significantly subjectivized to allow consideration of a potentially wide, yet not exhaustive, array of a defendant’s characteristics in assessing the reasonableness of his emotional distress. At the same time, abnormalities that might diminish a defendant’s capacity to conform his behavior to the requirements of the law, other than those relevant for this permitted purpose, are excluded from consideration and cannot mitigate murder to manslaughter.

IV. COMPARATIVE ANALYSIS

The remainder of this paper works with five models for assessing the mitigating capacity of a provoked defendant’s reaction: the objective reasonable man standard of *DPP v Camplin*; the particularized reasonable man standard of *Morgan Smith*; the justificatory proposal of the English Law Commission; the completely subjective proposal of Mackay and Mitchell; and the “actor’s situation” standard of the Model Penal Code. This section first proposes an analytic framework through which these models can be more conveniently discussed and compared. Using that model, it will assess the relative characteristics of these approaches with respect to their coverage, their philosophical soundness, and the discretion they grant to the jury.

150. See *Fields v. Commonwealth*, 44 S.W.3d 355 (Ky. 2001) (finding presence of mental illness relevant to subjective evaluation of reasonableness in EED defense); *People v. Casassa*, 404 N.E.2d 1310 (N.Y. 1980); *State v. Zdanis*, 438 A.2d 696, 700 (Conn. 1980) (finding psychiatric testimony of defendant’s condition of “utmost importance” in EED case); see also Singer, *The Resurgence of Mens Rea*, 27 B.C. L. REV. 243, 298 (1986) (enumerating instances in which courts have found psychiatric evidence relevant under actor’s situation standard).

151. Kadish, *supra* note 128, at 277.

152. See *supra* notes 147-48 and accompanying text.

A. *An Analytic Framework*

The distinguishing feature of the models upon which this paper centrally focuses is the standard against which a defendant's provoked response is compared. Specifically, the models differ in the degree of subjectivity they allow into this inquiry, often called the "objective prong" of the provocation defense.¹⁵³ One can thus visualize a continuum, ranging from least subjective on the left to most subjective on the right, along which the models can be positioned based on this quality.

The Law Commission proposal¹⁵⁴ contains the most objective standard of all of the models. It is the only proposal that views provocation as a partial justification¹⁵⁵ rather than as a partial excuse. Hence, unlike each of the other proposals, the focus here is on the *act* rather than on the *actor*.¹⁵⁶ Because it expressly forbids consideration of characteristics bearing on the defendant's capacity for self-control in the assessment of whether "a person of ordinary temperament . . . might have acted in the same or a similar way," the Law Commission proposal closely resembles a purely objective reasonableness standard.

Three formulations, the *Camplin* reasonable man test, the Model Penal Code, and the *Morgan Smith* approach, each rely on the concept of reasonableness in evaluating the defense and lie along the intermediate range of the continuum.¹⁵⁷ Al-

153. See *supra* notes 36, 122, and accompanying text for discussion of the two prongs of the traditional provocation defense. It may appear contradictory to speak of the degree of subjectivity allowed in the objective component of a defense. Although in each model the defendant is evaluated vis-à-vis an objective standard, this refers to the degree to which that objective standard is subjectivized to incorporate the defendant's personal characteristics.

154. See *supra* Part II.D.

155. See *supra* note 112 and accompanying text.

156. ROBINSON, *supra* note 14, § 25(d) ("The focus in excuses is on the *actor*. Acts are justified; actors are excused."). For additional distinction between the terms justification and excuse as used in this paper, see also *supra* note 14.

157. *DPP v Camplin*, [1978] AC 705 (HL) 718 (Lord Diplock); BLACKSTONE'S CRIMINAL PRACTICE, *supra* note 36, at 142; MODEL PENAL CODE § 210.3(1)(b) (1980).

though it does embrace a limited degree of subjectivity,¹⁵⁸ the *Camplin* reasonable man test¹⁵⁹ is the most objective of the three because it expressly forbids consideration of characteristics affecting the defendant's power of self-control.¹⁶⁰

The Model Penal Code's inquiry into the "actor's situation"¹⁶¹ allows greater subjectivity than is permitted under the *Camplin* approach. The Code's drafters made clear that they intended to allow the defendant's "personal handicaps and some external circumstances" to be considered in evaluating the defense,¹⁶² surpassing the very limited subjectivity of the *Camplin* approach. They were nonetheless careful to limit the scope of this inquiry, primarily in distancing the EMED defense from the diminished capacity defense, and to this end the standard remains primarily objective.¹⁶³

Among these three intermediate approaches, the *Morgan Smith* approach¹⁶⁴ is the most subjective. This approach allows the jury to particularize the standard against which the defendant is compared based on his own idiosyncratic characteristics.¹⁶⁵ By particularizing a reasonable man, the defense nonetheless retains a limited degree of objectivity.

Finally, the Mackay and Mitchell proposal¹⁶⁶ is the most subjective standard. A review of its language, that a provoked defendant is entitled to a manslaughter reduction if "the offence *ought* to be reduced to one of manslaughter,"¹⁶⁷ reveals that this formulation does not rely on any standard at all against which to measure the defendant's conduct. In phrasing the test to the jury in completely normative terms, the Mackay and Mitchell proposal is purely subjective.

158. Timothy Macklem & John Gardner, *Provocation and Pluralism*, 64 MOD. L. REV. 815 (2001) (explaining how the *Camplin* test allows limited subjectivity in assessing whether there was an action capable of constituting provocation, how provocative this action was, and how much self-control the defendant should have exercised).

159. See *supra* Part II.B.

160. See *supra* notes 67-69 and accompanying text.

161. See *supra* Part III.B.

162. MODEL PENAL CODE § 210.3(1)(b) cmt. 5 (1980).

163. See *supra* notes 147-48 and accompanying text.

164. See *supra* Part II.C.

165. BLACKSTONE'S CRIMINAL PRACTICE, *supra* note 36, at 141.

166. See *supra* Part II.E.

167. Mackay & Mitchell, *supra* note 113, at 758 (emphasis added).

To recapitulate, the continuum ranges from least subjective to most subjective as follows: the Law Commission proposal; the *Camplin* interpretation of Homicide Act 1957 section 3; the Model Penal Code's EMED formulation; the *Morgan Smith* interpretation of Homicide Act 1957 section 3; and the Mackay and Mitchell proposal.

B. *Interplay with Diminished Capacity*

The continuum can be viewed from an alternative perspective: As one travels from left to right, consideration of the defendant's diminished capacity is gradually folded into assessment of the provocation defense. Where the Law Commission proposal calls for a complete and inflexible distinction between these defenses, the partial excuse-based reasonable man in *Camplin* allows the jury minimal flexibility in considering a defendant's characteristics. Although its drafters expressed dissatisfaction with the diminished capacity defense, the Model Penal Code goes a degree further in this regard by considering the defendant's mental abnormalities in the assessment of his "situation" for the purposes of the EMED defense.¹⁶⁸ The particularized reasonable man of the *Morgan Smith* approach takes yet another step toward consummating the merger of provocation and diminished capacity by allowing the jury to decide whether an abnormality is to be considered in determining the level of self-control expected of a particular defendant.¹⁶⁹ Finally, Mackay and Mitchell advocate for complete joinder of the defenses. It is therefore unsurprising that in England, where both defenses are accepted, much debate regarding the proper formulation of the provocation defense focuses on the degree to which the defense is redundant with or complementary to diminished capacity.

On the one hand, it is conceivable that separation of the two defenses creates a gap in coverage into which a worthy defendant could land, finding no avail in either.¹⁷⁰ The de-

168. See *supra* text accompanying notes 148-52.

169. See *supra* text accompanying notes 88-90.

170. *R v Smith (Morgan)*, [2000] UKHL 49, [2001] 1 AC 146, 168 (Lord Hoffmann) ("There are in practice bound to be cases in which the accused will not be suffering from 'abnormality of mind' within the meaning of section 2 . . . but will nevertheless have mental characteristics . . . which the jury might think should be taken into account for the purposes of the provocation defence."); Horder, *supra* note 49, at 148 (describing means by which

fendant in *Luc Thiet Thuan v R* may in fact have fallen into such a gap, as the jury found his brain damage did not rise to the level of diminished capacity but was not permitted to consider this brain damage in assessing the reasonableness of his provoked response.¹⁷¹ Those suffering from post-partum depression or personality disorders constitute another class of defendants whose abnormalities may fall into this intermediate category.¹⁷² Because diminished capacity “does not cover the whole field of significant mental attributes which may affect provocation,” such defendants are often forced to make a “tactical judgment” whether to rely on both defenses or solely on provocation.¹⁷³ In practice, it may be that neither is adequate.¹⁷⁴

On the other hand, the hard distinction between those defendants to whom diminished capacity is available and those who may rely on provocation should make such a gap in coverage inconceivable.¹⁷⁵ A defendant is either psychologically normal, in which case he may effectively plead provocation, or he is abnormal and may benefit from diminished capacity.¹⁷⁶ In this sense, “the perceived injustice [of the gap between the defenses] is in fact covered by an application of [diminished capacity] in accordance with its ordinary meaning.”¹⁷⁷ A merger of the two defenses, as Mackay and Mitchell urge, may in fact *create* a gap in coverage. Where defendants invoke a provocation defense, the burden of proof is on the prosecu-

mentally disordered person who has, due to this disorder, lost self-control and killed could fall short of both diminished responsibility and provocation defenses).

171. *Luc Thiet Thuan v R*, [1996] UKPC 57, [1997] AC 131, 146-47.

172. *Morgan Smith*, [2001] 1 AC at 177 (Lord Clyde).

173. *Luc Thiet Thuan v R*, [1997] AC at 156 (Lord Steyn, dissenting).

174. *But see* Horder, *supra* note 49, at 163-66 (arguing that gap can be ameliorated by properly defining scope of provocation and diminished responsibility defenses).

175. *But see AG for Jersey v Holley*, [2005] UKPC 23, [2005] 2 AC 580 [66] (Lord Bingham and Lord Hoffmann, dissenting) (criticizing sharp demarcation between diminished responsibility and provocation).

176. Gardner & Macklem, *supra* note 24, at 629-30; *see also* Chalmers, *supra* note 119, at 212. *But see Morgan Smith*, [2001] 1 AC at 168 (Lord Hoffmann) (“I think it is wrong to assume that there is a neat dichotomy between the ‘ordinary person’ contemplated by the law of provocation and the ‘abnormal person’ contemplated by the law of diminished responsibility.”)

177. *Morgan Smith*, [2001] 1 AC at 191 (Lord Hobhouse, dissenting).

tion to prove beyond a reasonable doubt its absence.¹⁷⁸ Because placing the responsibility to prove the absence of diminished capacity on the prosecution would unacceptably require forcing defendants to submit to mental examination, the burden in a combined plea would likely fall on defendants. This would leave the provocation defense likely to fail in some situations where, standing alone, it would have succeeded.¹⁷⁹

A third alternative exists and posits that the question should not be one of a gap or the absence of a gap in coverage, but rather a question of the degree to which the two defenses overlap. Seen this way, jurists have argued, “the fact that . . . the distinct defence of diminished responsibility . . . was introduced should not be allowed to alter the scope or substance of the defence of provocation or colour one’s approach to an understanding of it.”¹⁸⁰ The mere fact that jurors may consider lesser impairments than would fit under diminished capacity in the context of a provocation defense does not, as a logical matter, necessarily exclude consideration in the same context of those impairments that also fit.¹⁸¹ On a more principled level, however, such an overlap between diminished responsibility and provocation undermines “the moral integrity of each defence.”¹⁸² Allowing defendants to

178. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 2 (Eng.); MODEL PENAL CODE § 210.3(1)(b) cmt. 5 (1980) (“The Model Code takes the [position that] once the defendant has come forward with some evidence of extreme emotional disturbance, the burden of proving its non-existence should shift to the prosecution. This is followed by several modern revisions.”).

179. Chalmers, *supra* note 119, at 211. Note that some American jurisdictions already impose a burden on the defendant to prove provocation by preponderance. *See, e.g.*, N.Y. PENAL LAW § 25.00(2) (2006) (defendant has burden of proving any “affirmative defense” by preponderance); *id.* § 125.25(1) (classifying extreme emotional disturbance as “affirmative defense”); *Patterson v. New York*, 432 U.S. 197 (1977) (affirming constitutionality of New York scheme placing burden of persuasion on defendant to establish provocation defense). In such jurisdictions, merging the two defenses would likely not require a change in this burden unless diminished capacity were required to be proved under a different standard of proof.

180. *Morgan Smith*, [2001] 1 AC at 175 (Lord Clyde).

181. *Id.* at 191 (Lord Hobhouse, dissenting); *id.* at 168 (Lord Hoffmann) (arguing that unless “the jury can [] be told that the law requires characteristics which could found a defence of diminished responsibility to be ignored in relation to the defence of provocation, there is no point in claiming that the defences are mutually exclusive”).

182. Horder, *supra* note 49, at 147.

plead the defenses together also raises practical concerns because jurors often conflate the two defenses, returning reduced verdicts where neither defense alone was merited.¹⁸³

Regardless of the theoretic overlap or independence of the two defenses, there is evidence to suggest that where the law maintains them separately, courts are nonetheless fearful of such a gap and willing to bend one or the other in order to accommodate an individual defendant.¹⁸⁴ *R v Ahluwalia*,¹⁸⁵ a case involving the provocation defense of a battered women tried under the *Camplin* rule, is instructive on this point. There the Court of Appeal was bound by the rule at the time that, to give rise to a provocation claim, the loss of self-control must have been sudden and temporary and could not have derived solely from a long history of serious abuse.¹⁸⁶ It was willing, however, to take a flexible approach regarding provocation's immediacy requirement and allow evidence of battering on the grounds that a delayed reaction did not necessarily preclude the defendant's claim that she suffered from a "sudden and temporary loss of self-control."¹⁸⁷

Data available from England in the wake of the *Morgan Smith* decision may also buttress claims that such a gap exists. In 2001-2002, the number of successful diminished responsibility pleas fell below twenty for the first time since the defense

183. *Id.* at 160-61 ("There is clear evidence that when defendants plead diminished responsibility and provocation together, they increase their chances of successfully reducing their crime from murder to manslaughter. This happens because juries put two and two together and make five.") (citing R.D. Mackay, *Pleading Provocation and Diminished Responsibility Together*, (1988) Crim LR 411).

184. Ashworth, *supra* note 69, at 314 (advocating rigid dichotomy between defenses but confessing it is "difficult to shed all one's misgivings as to whether the law actually operates in this way").

185. [1992] 4 All ER 889 (CA).

186. BLACKSTONE'S CRIMINAL PRACTICE, *supra* note 36, at 138.

187. *Ahluwalia*, [1992] 4 All ER at 896; Alexandra L. Wannop, *Battered Woman Syndrome and the Defense of Battered Women in Canada and England*, 19 SUFFOLK TRANSNAT'L L. REV. 251, 260-61 (1995). Ultimately, the defendant in *Ahluwalia* did receive the benefit of an offense reduction, but through a diminished capacity defense (which was not raised at trial) rather than provocation. *Ahluwalia*, 4 All ER at 899-900; Donald Nicholson & Rohit Sanghvi, *Battered Women and Provocation: The Implications of R. v. Ahluwalia*, (1993) Crim LR 728, 733-34; Donald Nicholson & Rohit Sanghvi, *More Justice for Battered Women*, 146 NEW L.J. 1122 (1995); Case and Comment, *R. v. Ahluwalia*, (1993) Crim LR 63.

was enacted, it fell to fifteen in 2001-2002, and it fell again to six in 2002-2003.¹⁸⁸ Homicide statistics over the same period reveal an increase in the number of common law manslaughter convictions.¹⁸⁹ Though the data by no means prove causation, the coincidence in these trends provides, at the least, strong circumstantial evidence for the proposition that some defendants who may in the past have unsuccessfully attempted to defend themselves on diminished responsibility grounds are now succeeding under a formulation of provocation that is more sensitive to their particular abnormalities. Even though they do not conclusively prove the *Morgan Smith* approach filled a previously existing gap, at a minimum the data suggest that defendants have retailored their defenses out of such a belief.

The absence of a normative guidepost for precisely which defenses should succeed ultimately undermines the descriptive power of these data and the coverage debate altogether. To the extent that perceptions of a gap in coverage motivate the desire to move rightward along the reasonableness continuum, it is only natural that such a move will result in broader incarnations of the defense and an increase in the number of murders mitigated to manslaughter. Without a concrete and authoritative assessment of how many of these murders *should* be mitigated to manslaughter, however, any claim that defendants have or have not landed in a gap under a given formulation rings empty.

C. *Philosophical Assumptions*

The reasonableness continuum additionally reflects the philosophical assumptions underlying the various models. Kevin Jon Heller's critical assessment of the use of subjective standards of reasonableness in provocation cases is particularly helpful in winnowing the philosophical foundations from each

188. Home Office Research, Development and Statistics Directorate (RDS), Crime in England and Wales 2002/03: Supplementary Volume 1: Homicide and Gun Crime 10 (Jan. 2004) (Table 1.02: Offences initially recorded as homicide by outcome England and Wales 1992 to 2002/03), available at <http://www.homeoffice.gov.uk/rds/pdfs2/hosb0104.pdf>.

189. *Id.*

of the various approaches.¹⁹⁰ Heller explains that a justification-based objective model, such as the Law Commission proposal, “necessarily presupposes an intentionalist account of human action” because it asks not whether a defendant *could* have controlled his response but whether he *should* have controlled it.¹⁹¹ At the opposing end of the continuum, a purely subjective approach, such as that proposed by Mackay and Mitchell, is rooted in a determinist model of human behavior.¹⁹²

Those models lying along intermediate points are necessarily premised on a form of partial determinism that excuses provoked responses attributable to overwhelming external circumstances but is unsympathetic to responses caused by idiosyncrasies of the defendant’s character.¹⁹³ Heller concludes that all such models are fundamentally untenable because they attempt to draw some distinction between the defendant’s character and his external circumstances.¹⁹⁴ The distinction is exceedingly problematic, he argues, because it “rests upon an extremely dubious empirical assumption [that] there are universal personal characteristics . . . [which is] little more than a liberal myth.”¹⁹⁵ Moreover, such approaches are highly susceptible to “time-framing,” or the argument that as the relevant timeframe is broadened, a defendant’s personal responsibility for those characteristics deemed inexcusable be-

190. Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1 (1998).

191. *Id.* at 20.

192. *Id.* at 57.

193. *Id.* at 25-26 (labeling such a view as the “external-determinist” view and explaining that a view is a form of partial determinism). Heller’s work explicitly indicates that the Model Penal Code formulation has this partial deterministic basis. *Id.* at 69-71. He does not explicitly analyze the *Camplin* or *Morgan Smith* approaches. Because it clings to an objective reasonable man standard and is based on an excusatory rationale, the *Camplin* approach is an instance of the “Excuse Version of the Objective Standard” which Heller does discuss and concludes is based on partial determinism. *Id.* at 37-38. The *Morgan Smith* approach is equivalent to the “Particularizing Standard” of Heller’s analysis which he concludes is also partially deterministic. *Id.* at 80.

194. *Id.* at 49 (“Just as intentionalism is impossible to philosophically justify in a world that acknowledges determinism, determinism is impossible to justify in a world that acknowledges intentionalism.”).

195. *Id.* at 39-41.

comes increasingly attenuated.¹⁹⁶ Due to this philosophical incoherence, Heller would reject all those approaches lying between the two extremes of the continuum.¹⁹⁷

One may argue that Heller misinterprets the excusatory underpinnings of these approaches. Rather than asking whether the defendant's provoked act is justified or excused, these intermediate approaches could be construed as asking whether the law should protect the defendant's underlying *state of mind*, in essence whether "we should share his emotional assessment of wrongdoing and blame."¹⁹⁸ Under this view the defense rejects a purely objective standard looking abstractly at the triggering act, instead looking subjectively into the mind of the defendant.¹⁹⁹ Whether or not society is willing to protect this emotion is a normative judgment on whether this emotion was "warranted."²⁰⁰ Ultimately, society mitigates only where the *emotional outbreak* that caused the defendant's act is justified even though the defendant's act itself is not.²⁰¹ Seen in this light, the defendant's ability to control himself is irrelevant to the judgment imposed, and acceptance of determinism is no longer a necessary ingredient of the defense.

Furthermore, a rejection of all models lying between the two extremes of the continuum on the grounds Heller advocates would be paramount to a rejection of the criminal law generally. As Heller himself concedes, Anglo-American criminal law embraces an inherent tension between intentionalist and determinist models of human behavior.²⁰² This tradition is premised on the belief that an act must have been committed voluntarily in order to be justly punished.²⁰³ On the other

196. *Id.* at 63, 92.

197. *See id.* at 100-02 (ultimately rejecting the "Excuse-Based Objective," "Model Penal Code," and "Particularizing" standards on these grounds).

198. Nourse, *supra* note 25, at 1396.

199. *Id.* at 1394-95.

200. *Id.* at 1398.

201. Gardner & Macklem, *supra* note 24, at 628.

202. Heller, *supra* note 190, at 12.

203. LAFAVE, *supra* note 12, at 304 ("[I]t is clear that criminal liability requires that the activity in question be voluntary.") (citing MODEL PENAL CODE § 2.01(1)); BLACKSTONE'S CRIMINAL PRACTICE, *supra* note 36, at 6 ("The vast majority of criminal offences require acts or omissions on the defendant's part, and these acts or omissions must ordinarily be willed or 'voluntary'").

hand, “the law treats man’s conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were.”²⁰⁴ To discard all intermediate approaches along the continuum because they retain elements of both determinism and intentionalism is thus akin to throwing the baby out while leaving the bathwater behind.

Assessing the merits of the intermediate approaches thus reduces to an exercise in line-drawing. The Law Commission’s justification-based proposal seeks to obviate this exercise by specifying a priori a class of conduct that society is willing to justify for all defendants without inquiry into their particular traits or abilities. The purely subjective proposal of Mackay and Mitchell is, in essence, a refusal to draw a line of a different sort. Taken to its logical extreme, it would excuse not only all murders committed while under “extreme emotional disturbance and/or . . . unsoundness of mind,” but would ultimately excuse *all* murders.²⁰⁵ In between, the law is left to engage in a “specious line drawing.”²⁰⁶

But line drawing is one function for which common law evolution is particularly well suited. As Lord Steyn eloquently put the argument in *Luc Thiet Thuan*:

We ought not to shrink for this reason from recognising a rational and just development. The traditional common law answer is apposite: any difficult borderline cases will be considered if and when they occur. In the meantime nobody should underestimate the

204. Celia Wells, *Provocation: The Case for Abolition*, in *RETHINKING ENGLISH HOMICIDE LAW* 85, 106 (Andrew Ashworth & Barry Mitchell eds., 2001) (quoting Herbert L. Packer, *THE LIMITS OF THE CRIMINAL SANCTION* 74-75 (1969)); see also AMERICAN LAW INSTITUTE, *supra* note 132, § 2.01 cmt. 1 (Official Draft and Revised Comments 1980) (“The term ‘voluntary’ as used in this section does not inject into the criminal law questions about determinism and free will.”); David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 389 (1976) (“Although it has been asserted repeatedly that only a free choice to do wrong will be punished, in practice the law presumes, almost irrebutably, that proscribed behavior is the product of ‘a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.’”) (quoting Roscoe Pound, *Introduction to FRANCIS BOWES SAYRE, CASES ON CRIMINAL LAW* xxxvii (1927)).

205. See Heller, *supra* note 190, at 65 (arguing that any standard based on complete determinism “logically necessitates excusing all criminal acts”).

206. See Reed, *supra* note 33, at 89 (referring to line-drawing difficulty in English law under *Camplin*).

capacity of our law to move forward where necessary²⁰⁷

As such, the need to draw lines is certainly not a compelling reason to force a false choice between two extremes.

D. *Relationship with the Jury*

The continuum is also a useful tool in measuring the scope of juror discretion and, consequently, the gravity of potential juror bias under each of the five approaches. Beginning with the Law Commission proposal, the jury is confined to determining whether the defendant's provoked conduct falls within the range of behavior that the community is willing to justify. Though the jury is instrumental in setting this standard,²⁰⁸ it has no flexibility in adapting the standard to suit the peculiarities of the defendant or his situation.

From this endpoint, juror discretion necessarily increases as one travels from left to right along the continuum. The *Camplin* approach grants the jury additional discretion in removing the judge's ability to dictate precisely the reasonable man's characteristics.²⁰⁹ The Model Penal Code more directly puts the ultimate question to the jury by greatly expanding not only the scope of what may constitute provocation but also those elements of the "actor's situation" that may be considered relevant.²¹⁰ The ability of the jury to particularize the reasonable man formulation allowed under the *Morgan Smith* approach allows the jury even broader discretion in tailoring society's objective standard to the defendant's characteristics as it sees fit.²¹¹ Finally, the formulation proposed by Mackay

207. *Luc Thiet Thuan v R*, [1996] UKPC 57, [1997] AC 131, 157 (Lord Steyn, dissenting).

208. *R v Smith (Morgan)*, [2000] UKHL 49, [2001] 1 AC 146, 163 (Lord Hoffmann) ("[T]he jury was given a normative as well as a fact-finding function. They were to determine not merely whether the behaviour of the accused complied with some legal standard but could determine for themselves what the standard in the particular case should be.").

209. See *supra* text accompanying note 45.

210. See Nourse, *supra* note 25, at 1404 (explaining that Model Penal Code was designed to allow juries to "find even greater reasons in emotion for sympathy and return many more manslaughter verdicts").

211. See Gardner & Macklem, *supra* note 24, at 631 (arguing that the *Morgan Smith* approach was flawed in this regard for allowing juries to apply "what they consider to be appropriate standards" in lieu of the actual appropriate standards).

and Mitchell obviates objectivity altogether, putting the question whether to excuse or not to excuse precisely before the jury with little restriction other than that it find the defendant did actually suffer from extreme emotional disturbance.

For those approaches that retain an objective component, the construction of reasonableness and the circumstances through which it is assessed become the means of guiding the jury's discretion toward a social judgment. In this respect, reasonableness is "a device for delivering to the jury, in its role as conscience of the community, the normative or value judgment as to the degree of moral culpability to be assigned to the particular offender."²¹² Wherever distinct juries construe the meaning of "reasonable" independently as applied to particular cases, it is inevitable that each member of the community cannot be held to precisely the same standard of conduct. Such a standard, if seen as a substantive device, can never be truly objective.²¹³ If this standard is instead seen as a procedural device aimed at guiding jury discretion, however, the standard is an objective one so long as it is correctly applied by a jury that is impartial.²¹⁴

A critical quality of such a procedural device is its hermeneutic soundness. If the jury is to be expected to correctly apply a standard, that standard must have sufficient explanatory power to enable the jury to properly understand it.²¹⁵ It is difficult to extrapolate any clear correlation between an approach's placement on the continuum and its hermeneutic quality. In fact, each of the five formulations considered in this paper is open to criticism that its directives are unacceptably confused, vague, or impracticable.

Although its language is understandable and precise, the Law Commission approach has been criticized as impracticable because it is doubtful that its hypothetical "person . . . of

212. Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 448 (1981).

213. Heller, *supra* note 190, at 16.

214. *Id.*

215. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 149 (1988) (presenting research that the problem with juries applying limiting instructions lies in the incomprehensibility of the instructions themselves).

ordinary temperament” even exists.²¹⁶ The *Camplin* approach’s delineation between peculiarities bearing on the gravity of the provocation and those merely bearing on the accused’s level of self-control has reportedly induced a “glazed look” in the eyes of jurors asked to draw this distinction.²¹⁷ It has also been challenged on practicability grounds, namely that it is “inconsistent with the opinion of behavioural sciences that the accused’s personality must be taken as a whole and cannot be dissected into the way he or she would view some provocative conduct on the one hand and the way he or she would respond emotionally to that conduct on the other.”²¹⁸ Similarly, the particularization standard that the *Morgan Smith* approach requires is criticized as “cognitively impossible” for jurors due to its assumption that a juror can “make a hermeneutic leap into the mind of an individual who is very different than she, imagining how she would perceive the world and react to those perceptions.”²¹⁹ Both the Model Penal Code and the Mackay and Mitchell approach are inherently and deliberately vague,²²⁰ exposing them to complaint that they are circular and merely beg the question.²²¹ Finally, for any approach in which a concrete formulation of diminished capacity is incorporated into the defense, the threat of “role confusion” due to medicalization arises, whereby jurors are easily confused on the degree to which they should defer to medical

216. See R.D. Mackay & B.J. Mitchell, *But Is this Provocation? Some Thoughts on the Law Commission’s Report on Partial Defences to Murder*, (2005) Crim LR 44, 52 (questioning whether the construct “a person of ordinary temperament” is scientifically sound).

217. *R v Rongonui*, [2000] NZCA 273, 2 NZLR 385 [205] (Thomas, J., dissenting) (applying same distinction as that embraced in *Camplin*).

218. STANLEY YEO, *UNRESTRAINED KILLINGS AND THE LAW* 60 (1998).

219. Heller, *supra* note 190, at 85, 88.

220. See MODEL PENAL CODE AND COMMENTARIES, *supra* note 132, § 210.3(1)(b) cmt. 5, at 62-63 (explaining that Model Penal Code does not specifically explicate scope of subjectivity in EMED provision because such scope “cannot be resolved satisfactorily by abstract definition” and should be left “to the ordinary citizen in the function of a juror assigned to resolve the specific case”); see also notes 113-19 and accompanying text (describing vast discretion given to jurors under Mackay and Mitchell approach).

221. Chalmers, *supra* note 119, at 205. See also Paul H. Robinson, *The Modern General Part: Three Illusions*, in *CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART* 75, 90-91 (Stephen Shute & A.P. Simester eds., 2002) (arguing that such formulations create unpredictability in application of law).

opinion for conclusions of psychic abnormality.²²² In short, approaches drawn from the intermediate region of the continuum appear somewhat more prone to hermeneutic deficiency, though none of the five specific approaches surveyed is immune.

Moving beyond this hermeneutic analysis, it is important to make explicit what jury “impartiality” means. The Law Commission approach invokes an objective standard that asks jurors to represent the “conscience of the community” in determining whether the defendant’s conduct falls within a partially justified range of behavior.²²³ Jurors thus necessarily must bring to this process a set of preconceived notions regarding which provoked acts are justified and which are not.²²⁴ This bias naturally reflects the norms of the communities in which jurors live.²²⁵ Critical scholars have repeatedly demonstrated that jury impartiality is not realized where these norms are prejudiced in favor of male behavior and do not adequately reflect the norms of marginalized social groups.²²⁶ To achieve impartiality in this context requires not that jurors enter deliberations without bias, but that they represent a fair cross section of the community in order that this underrepresentation of particular social groups does not occur.²²⁷ This vision of “diffused impartiality” is shared by the purely subjective Mackay and Mitchell approach that, although it does not purport an objective standard, assumes that individual jurors refrain from allowing their particular conceptions of

222. Edward Griew, *The Future of Diminished Responsibility*, (1988) Crim LR 75, 85.

223. See Donovan & Wildman, *supra* note 212, at 448 (discussing this role of jury in context of American jurisdictions using similar objective, justification-based approach).

224. Heller, *supra* note 190, at 17-18.

225. *Id.*

226. See generally, e.g., CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (2003) (suggesting that members of traditional “majority culture” are most capable of manipulating concept of reasonableness by invoking dominant cultural norms); Edwards, *supra* note 119 (arguing that law’s objective tests are validation of male experience at expense of female perspective); Camille A. Nelson, *(En)raged or (En)gaged: The Implications of Racial Context to the Canadian Provocation Defence*, 35 U. RICH. L. REV. 1007 (2002) (arguing that objective formulation of provocation fails to adequately capture way in which majority culture itself may be provocative to racialized persons).

227. Heller, *supra* note 190, at 31-32.

reasonableness to color the factual finding of whether a given defendant did not honestly suffer from emotional distress or abnormality of mind.²²⁸ Of course, the impaneling of juries representing fair cross sections of their communities has proven to be an elusive ideal and is unlikely to be realized in the near future in either the United States or England.²²⁹

In contrast, those approaches falling along the intermediate range of the continuum view jury impartiality as the absence of bias. Where a justification-based approach draws on community norms in asking whether the defendant *should* have controlled himself, these partial excuse-based approaches ask jurors to objectively determine whether a reasonable person in the defendant's circumstances *could* have controlled himself.²³⁰ Jurors are thus asked to exercise a "universal reason" and to discard their own personal biases in applying this test of reasonableness.²³¹ It is obviously questionable whether jurors are capable of discarding their personal biases or whether such "universal reason" even exists.²³²

228. *Id.* at 59.

229. See, e.g., JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 24 (1977) ("[I]n most courts in the United States significant segments of the population are still not included on juries as often as they would be in a completely random system aimed at impaneling a representative cross-section . . . in many jurisdictions, the underrepresentation of [blue-collar workers, non-whites, the young, the elderly, and women] is substantial and dramatic."); The Right Honourable Lord Justice Auld, Review of the Criminal Courts of England and Wales, 140-59 (2001), available at <http://www.criminal-courts-review.org.uk/auld-contents.htm> (lamenting that "[d]espite all the reforms of the latter half of the last century, juries in England and Wales mostly still do not reflect the broad range of skills and experience or ethnic diversity of the communities from which they are drawn" and describing causes of unrepresentativeness in English juries).

230. Heller, *supra* note 190, at 101-02.

231. *People v. Comfort*, 496 N.Y.S. 2d 863, 865 (N.Y. App. Div. 1985).

232. Kim Lane Scheppele, *Forward: Telling Stories*, 87 MICH. L. REV. 2073, 2083 (1989) (explaining research revealing "perceptual fault lines [occurring] at the boundaries between social groups"). Heller refers to findings of a number of such boundaries. Heller, *supra* note 190, at 50-51; see, e.g., *Developments in the Law—Race and the Criminal Jury*, 101 HARV. L. REV. 1472, 1560 (1998) (differences in criminal conviction rate occur along racial lines); VAN DYKE, *supra* note 229, at 35-39 (differences in perception of law enforcement due to juror age); REID HASTIE ET AL., *INSIDE THE JURY* 129 (1983) (marital status affects jurors' verdict preference); Cookie Stephan, *Selective Characteristics of Jurors and Litigants: Their Influences on Juries' Verdicts*, in *THE JURY SYSTEM*

As observed in the context of the coverage debate,²³³ it is impossible to conclude that any approach is superior to another on account of the degree of discretion it grants to the jury without normative guidance on what the proper degree of discretion ought to be. On this issue, courts and commentators are sharply divided.²³⁴ Nonetheless, the continuum has value in this debate for providing both a means to assess the relative amount of jury discretion that different formulations afford as well as a ready conception of how a given approach conceives of jury impartiality.

V. PLACING THE PROVOCATION DEFENSE IN CONTEXT

The preceding section proposed an analytic device revealing that the various provocation formulations of England and the United States can be viewed as points along a continuum with respect to their relationship to the diminished capacity defense, their underlying philosophical assumptions, and the discretion that they vest in the jury. This analysis was limited, however, by the absence of a clear understanding of provocation's role in the broader framework of the criminal law. The search for provocation's proper place is the focus of this section.

IN AMERICA: A CRITICAL OVERVIEW 97, 114 (Rita James Simon ed., 1975) (differences in occupation affect jurors' verdict preference).

233. See *supra* Part IV.C.

234. For an example of the view that wide jury discretion is necessary in assessing provocation defenses, see Robinson, *supra* note 221, at 91 (“[C]riminal law theory has yet to find a principle that will convincingly distinguish the characteristics that ought to be included from those that ought to be excluded with individualizing the reasonable person standard. In the absence of such a theory . . . it is hard to see any approach other than . . . uncontrolled ad hoc discretion.”). For an argument advocating containment of juror discretion, see Chalmers, *supra* note 119, at 206 (asking why juries should be afforded wider discretion in cases involving reduction of murder to manslaughter than they are in other contexts); *State v. Elliot*, 411 A.2d 3, 7-8 (Conn. 1979) (arguing that wide scope of juror discretion allowed in Model Penal Code formulation “ignore[s] the realities of the courtroom”).

A. *Why Do England and the United States Provide a Provocation Defense?*

As discussion of the foundations of contemporary provocation doctrine reveals,²³⁵ provocation has enjoyed a long life in Anglo-American law and the reasons for its modern presence are largely historical.²³⁶ Although there are those calling for the provocation defense to be eliminated,²³⁷ most who have weighed in either advocate for or assume its retention.²³⁸ Retentionist arguments range from the need to “finely tune levels of criminal responsibility on the basis of differential culpability” to the desire to appropriately protect a defendant’s emotional state of mind.²³⁹

Whatever beneficial purpose the defense may serve, discerning why the defense *actually* exists in the law today is elusive.²⁴⁰ Professor Jeremy Horder has provided perhaps the

235. See *supra* Part II.A (foundations of English provocation law) and Part III.A (foundations of American provocation law).

236. LAFAVE, *supra* note 12, at 789.

237. See, e.g., Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003). Morse argues that whatever rationale that applies in the reduction of murder to manslaughter could certainly apply in mitigating other crimes and thus calls for the creation of a broader and more generic mitigation defense in its stead. *Id.* at 289. Others contend that such a general mitigation defense, without any specific directives to jurors on when mitigation is and is not appropriate, threatens to reduce homicide trials into a lottery with an even greater premium on advocacy and jury composition. *Partial Defences to Murder*, (2004) Crim LR 1, 2. This objection may be less compelling in light of accepted capital sentencing practice in the United States, whereby jurors receive only a general directive to weigh so-called “aggravating” and “mitigating” factors in deciding whether or not to apply the death penalty. *Gregg v. Georgia*, 428 U.S. 153 (1976) (approving bifurcated capital sentencing scheme based on weighing of statutory factors of aggravation and mitigation); *Lockett v. Ohio*, 438 U.S. 586 (1978) (requiring that capital sentencing scheme permit individualized consideration of any aspect of defendant’s character and circumstances of offense in mitigation).

238. See, e.g., Dressler, *supra* note 24; Nourse, *supra* note 25, at 1389. *But see* LAW COMM’N, PARTIAL DEFENCES REPORT, *supra* note 23, at 11 (noting that slightly over half of all respondents to Law Commission survey did not favor retention of defense if mandatory penalty for murder eliminated).

239. Dressler, *supra* note 24, at 1001; Nourse, *supra* note 25, at 1395 (“[T]he law should see the defendant’s state of mind (his emotion) as something that, in some cases, it should protect.”).

240. LAW COMM’N, PARTIAL DEFENCES REPORT, *supra* note 23, at 33; *see also* Law Comm’n, *Partial Defences to Murder*, Consultation paper Paper No. 173, 6 (2003), available at <http://www.lawcom.gov.uk/docs/cp173.pdf> [hereinafter

most convincing account of the doctrine's historic underpinnings in England.²⁴¹ He explains that early provocation law was based on "Aristotelian notions of just retribution . . . for unjust losses [of personal honor] attributable to provocative wrong-doing."²⁴² This justificatory account cannot explain the doctrine's place in contemporary criminal law because, even aside from the more excusatory flavor of modern provocation law, it is certainly not proper today for a "virtuous person" to react with violence merely to defend one's honor.²⁴³

A practical motive for allowing a partial defense to mitigate murder to manslaughter is the desire to attach a different label to conduct viewed as reflecting a lesser degree of moral turpitude.²⁴⁴ To reduce the nature of an offense from murder to manslaughter because a particular criminal act is thought to deserve a less stigmatic label, however, is to allow the tail to wag the dog. If an offense truly deserves a less stigmatic label

Law Comm'n Consultation Paper] ("there has never been a time when the doctrine was truly coherent, logical, or consistent").

241. Jeremy Horder, *PROVOCATION AND RESPONSIBILITY* (1992), cited with approval in Dressler, *supra* note 24, at 970; Law Comm'n Consultation Paper, *supra* note 240, at 6.

242. G.R. Sullivan, *Anger and Excuse: Reassessing Provocation*, 13 OXFORD J. LEGAL STUD. 421, 422 (1993) (explaining Horder's thesis).

243. Dressler, *supra* note 24, at 971 (rejecting Horder's account as justification for retaining provocation defense).

244. Cf. LAW COMM'N, *PARTIAL DEFENCES REPORT*, *supra* note 23, at 108 ("[T]he two partial defences rest on entirely different moral bases and the fact that they my [sic] be run together on occasions is not a reason for merging them."). The desire to attach to defendants a stigma no greater than that which they deserve is present throughout the criminal law and in fact informs the question of whether or not provocation and diminished responsibility should be viewed as a single defense. See Gardner & Macklem, *supra* note 24, at 630 (arguing that merging defenses will not allow diminished capacity defendants to retain self-respect by entering defense of provocation, but will merely attach greater stigma to provocation defense for all defendants); Mackay & Mitchell, *supra* note 113, at 756-57 (arguing that stigma attaching to diminished capacity defendants perpetuates "unfortunate attitude towards the mentally disordered [and] relegates the interest in avoiding a murder conviction as being less important than what is referred to as a defendant's 'interest in being accorded their status as fully-fledged human beings'"); Gardner & Macklem, *supra* note 119, at 216 (responding to Mackay and Mitchell that it is "doubly irrelevant to ask . . . 'what would the majority of defendants prefer: a diminished responsibility manslaughter conviction, or one of murder'" because the correct choice is between diminished responsibility defense and provocation defense).

it is because the conduct is less worthy of condemnation. This fact, rather than the mere desire to attach a different label to the conduct, is what should drive the decision to reduce the nature of the offense. This rationale alone is therefore inadequate.

Another practical, perhaps obvious, rationale for all partial defenses is their ability to define a sentencing range different from that of the offense they mitigate. A desire to provide an alternative to English law's mandatory life sentence for murder is, in fact, the generally accepted rationale for the inclusion of sections 2 and 3 in the Homicide Act 1957.²⁴⁵ While compelling, this purpose fails to completely explain the considerable support for retaining the provocation and diminished capacity partial defenses in English law even if the mandatory life sentence provision is abandoned.²⁴⁶ It similarly does not explain the continued viability of the provocation defense in the United States where most jurisdictions have long ago abandoned a fixed penalty for murder.²⁴⁷ Of course, even in the absence of a mandatory life sentence the penalty for the reduced offense will likely be lighter than it is for unprovoked homicides. But again, this differentiation alone does not necessitate recognition of a formal provocation defense where it can be accomplished through alternative means.²⁴⁸

B. *Deconstructing the "Concession to Human Frailty" Rationale*

One can only spend little time studying Anglo-American provocation doctrine before encountering the most oft-repeated rationale for the defense: that it is a "concession to human frailty."²⁴⁹ The House of Lords invoked the phrase in *Camplin* to justify its adoption of a rule embracing the Ashworth distinction between those characteristics that affect the severity of provocation and those that affect only the power of

245. LAW COMM'N, PARTIAL DEFENCES REPORT, *supra* note 23, at 26.

246. *See id.* at 11. *But cf. id.* at 91-92 ("A significant *minority* of consultees, particularly amongst the judiciary, favoured the abolition of the defence provided that the mandatory life sentence was abolished.") (emphasis added).

247. LAFAVE, *supra* note 12, at 789.

248. *See Morse*, *supra* note 237, at 298-99 (discussing sentencing practices and generic mitigation defense as two alternative means of expressing defendants' partial responsibility in punishment).

249. *See supra* note 24.

self-control.²⁵⁰ Two of the three justices writing for the majority in *Morgan Smith* invoked it two decades later to explain why they believed section 3 required juries to consider the defendant's particular characteristics in assessing the reasonableness of his actions.²⁵¹ The drafters of the Model Penal Code found the phrase no less apt in the United States and justified their recognition of the provocation defense with the same language.²⁵² Cognizant of the seemingly universal acceptance of the rationale, Mackay and Mitchell seized upon a variation of the phrase in proposing that the defense be merged with another concession to human imperfections: diminished capacity.²⁵³ That the same rationale has been invoked to justify such a motley collection of divergent formulations of provocation suggests that divergent conceptions of what "concession to human frailty" actually means are the actual source of difference among the various English and American approaches.

Though the phrase dates to at least the mid nineteenth century, there is little surrounding language in early reports to confine its meaning precisely.²⁵⁴ This is problematic because

250. *DPP v Camplin*, [1978] AC 705 (HL) 717-18 (Lord Diplock) ("But to require old heads upon young shoulders is inconsistent with the law's compassion to human infirmity to which Sir Michael Foster ascribed the doctrine of provocation more than two centuries ago.").

251. *R v Smith (Morgan)*, [2000] UKHL 49, [2001] 1 AC 146, 154 (Lord Slynn) ("It is in recognition of human frailty that the scope of the defence of provocation has, to a very limited extent, been enlarged.") (quoting *R v Campbell (Colin)*, [1997] 1 Cr App R 199 (CA) 207 (Lord Bingham)); *id.* at 159 (Lord Hoffmann) ("The doctrine of provocation has always been described as a concession to human frailty and the law illustrates Kant's dictum that, from the crooked timber of humanity, nothing completely straight can be made.").

252. MODEL PENAL CODE AND COMMENTARIES, *supra* note 132, § 210.3(1)(b) cmt. 5 at 55 ("[Provocation] is a concession to human weakness and perhaps to non-deterability, a recognition of the fact that one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence.").

253. Mackay & Mitchell, *supra* note 113, at 757 (arguing that the two defenses are compatible because "both provocation and diminished responsibility are concerned with rationality defects"). *But see* Gardner & Macklem, *supra* note 119, at 214 (rejecting this argument "because it trades on an ambiguity in the expression 'rationality defect'").

254. *See, e.g., R v Kirkham*, (1837) 8 C&P 115, 119; 173 ER 422, 424 ("[T]hough the law condescends to human frailty, it will not indulge human ferocity.").

the word “human” in this context is subject to two vastly different interpretations. One interpretation, and almost certainly that intended when the phrase was coined,²⁵⁵ is that the word “human” is to be interpreted broadly as “a reference to that human frailty to which we are all subject and of which the jury may be expected to take cognisance.”²⁵⁶ The word “human” here means the opposite of “idiosyncratic,” suggesting a stark contrast with the peculiar frailties to which the diminished capacity defense is targeted.²⁵⁷

Alternatively, the word “human,” if framed more narrowly, underscores the need to assess particular defendants’ capacity to control their behavior lest they be punished for conduct beyond their ability to prevent. Proponents of shifting the law rightward along the continuum regularly invoke the phrase in advancing the need for a more subjective approach.²⁵⁸ This interpretation thus necessarily views “human” to include universal as well as idiosyncratic human characteristics. It is therefore logical to view the construction of the word “human” as a proxy for whether or not aspects of a defendant’s diminished capacity should properly be considered in assessing the provocation defense.

How one defines the word “frailty” is also relevant in constructing the defense. Traditionally, the word has been construed narrowly and is confined primarily to emotional outbursts rooted in anger.²⁵⁹ This has occasionally been broad-

255. See Law Comm’n Consultation Paper, *supra* note 240, at 11 (“The law of provocation prior to the 1957 Act reflected that general policy. It involved a concession to human frailty, but the frailty was that of mankind at large, not the frailty of an individual defendant.”).

256. *Morgan Smith*, [2001] 1 AC at 207, (Lord Millett, dissenting) (citing Second Report for Revising and Consolidating Criminal Law of 1846).

257. Gardner & Macklem, *supra* note 24, at 627 (“It is true, of course, that excuses are there to make allowances for human frailties. But ‘human’ here serves mainly as the opposite of ‘idiosyncratic.’ The emphasis is on the frailties that people share with their fellow human beings *qua* human, rather than the frailties that set them apart. Pleas like diminished responsibility and insanity are different in this respect from excuses.”).

258. See *supra* note 251; see also *AG for Jersey v Holley*, [2005] UKPC 23, [2005] 2 AC 580 [45] (Lord Bingham and Lord Hoffmann, dissenting) (remarking that the law should “not require more from an imperfect creature than he can perform”) (quoting *Kirkham*, 8 C&P 115, 117).

259. LAFAVE, *supra* note 12, at 777 (explaining that “passion” in American heat-of-passion doctrine is generally rage); see generally Edwards, *supra* note 119, (arguing that traditional construction of defense in English law improp-

ened to include fright or “wild desperation.”²⁶⁰ If provocation is viewed as a partial excuse, however, it is questionable why the law should make a special concession to anger at the exclusion of other strong emotions.²⁶¹ As the range of emotion is extended, however, the law risks further muddling the concept of “loss of self-control” upon which many formulations of the defense depend.²⁶² In either case, it is clear that the word “frailty” does not specify any particular approach and leaves the relevant range of emotion open to interpretation.

Even the word “concession” in this mantra is open to interpretation. Today the word is generally taken to mean that a defendant acting out of “human frailty” is entitled to excuse.²⁶³ The Law Commission’s proposal, on the other hand, illustrates that the word is capable of a more narrow interpretation whereby to receive a concession, the defendant “should have some moral right on his side in relation to the victim rather than simply being an example of human frailty in giving way to overwhelming anger.”²⁶⁴ This cuts directly to the question whether the defense recognized is one rooted in justification or excuse.

erly elevates anger above fear, despair, compassion, or empathy in large part due to male normative views on emotion).

260. See, e.g., *LaPierre v. State*, 734 P.2d 997 (Alaska Ct. App. 1987) (fright); *Commonwealth v. Colandro*, 80 A. 571 (Pa. 1911) (terror); *People v. Borchers*, 50 Cal.2d 321, 325 P.2d 97 (Cal. 1958) (“wild desperation”).

261. *Partial Defences to Murder*, *supra* note 237, at 3. This question appears in fact to have provided some of the impetus for the Mackay and Mitchell proposal. Mackay & Mitchell, *Replacing Provocation*, *supra* note 119, at 222 (explaining that combined plea could narrow the range of cases in which anger alone excuses while broadening scope of defense for other emotions).

262. LAW COMM’N, PARTIAL DEFENCES REPORT, *supra* note 23, at 36 (explaining that as courts have allowed flexibility in defense to include fear and “slow-burn” cases the concept of self-control has become more unclear). Interestingly, the Law Commission did ultimately extend the range of emotion that the defense covers beyond anger in conceding to “fear of serious injury” based in part on psychiatric testimony that the two emotions are “virtually identical” physiologically. *Id.* at 53, 70.

263. See, e.g., *Holley*, [2005] UKPC [54]-[58] (Lord Bingham and Lord Hoffmann, dissenting) (citing *Bedder* reference to provocation as “a concession” in construing defense as an excuse); *Morgan Smith*, [2000] UKHL 49, [2001] 1 AC 146, 162-63 (Lord Hoffmann) (discussing “concession” in exculpatory context); *id.* at 179-80 (Lord Clyde) (same).

264. *Reshaping Provocation*, *supra* note 111, at 872 (commenting on LAW COMM’N, PARTIAL DEFENCES REPORT, *supra* note 23).

Returning to the continuum, each of the five formulations of the provocation defense thus corresponds to a particular interpretation of the phrase “concession to human frailty.”²⁶⁵ Four of the five rely on the phrase as the rationale for the defense.²⁶⁶ Interestingly, of the three approaches that have been or are currently implemented in English and American jurisdictions, none of them grants a qualified concession based on the phrase’s original meaning²⁶⁷ (a broad construction of the word “human” and recognizing a narrow class of frailty) or that meaning most opposite to it (a very unqualified concession based on a broad construction of the word “human” and recognizing a broad range of frailty).²⁶⁸ Therefore, it would appear that the true power of the phrase lies not in any substantive meaning it possesses, but rather in its ease of manipulation.

But this power is also a weakness and exposes provocation doctrine to “the defects of compromise.”²⁶⁹ In the hands of judges and policymakers, the “concession to human frailty” rationale creates a tremendous temptation to tailor the law to

265. The Law Commission proposal grants a qualified concession (one that requires the defendant to possess a moral right in relation to the victim), construes the word “human” broadly, and recognizes a narrow class of frailty (it is constricted to the emotions of fear and anger). The *Camplin* approach grants a more unqualified concession (rooted in excuse and thus requiring no moral justification), construes the word “human” broadly, and recognizes a narrow class of frailty. The Model Penal Code grants a similarly unqualified concession, construes the word “human” both broadly and narrowly (narrowly in the sense that it considers the defendant’s “situation” but also broadly because it restricts from this “situation” some of a defendant’s particular abnormalities), and recognizes a broad range of frailty (it extends frailty to “extreme mental or emotional disturbance”). The *Morgan Smith* approach also grants an unqualified exception, construes the word “human” narrowly (it allows particularization of the reasonable man), and recognizes a broad range of frailty. Finally, the Mackay and Mitchell proposal grants a very unqualified concession (one that does not measure the defendant’s conduct against any objective standard), construes the word “human” narrowly, and recognizes a broad range of frailty.

266. See *supra* notes 250-53 and accompanying text.

267. This traditional conception of provocation as a justificatory defense recognizing a narrow set of defects shared among all humans is best given by the Law Commission proposal.

268. By creating a defense rooted wholly in an excusatory rationale whereby a wide class of particularized defects are given consideration, the Mackay and Mitchell proposal best represents this meaning of the phrase.

269. Law Comm’n Consultation Paper, *supra* note 240, at 82.

personal conceptions of which defendants are most deserving of the law's sympathy. After a thorough review of the doctrine's evolution in English law, the Law Commission made precisely this observation:

The expansion of provocation over the past half century can be seen as an attempt by courts and juries to avoid a conviction of murder with a mandatory life sentence in cases where the court has had some degree of sympathy for the defendant. A reformulation of provocation, without regard to [its place in] the surrounding law of murder, would not be satisfactory in the long term and would leave the law still subject to the same pressures as have led to the past expansion of provocation.²⁷⁰

Tellingly, the Law Commission did not invoke the rationale once in its call to retain the defense or in justifying its reformulation.²⁷¹ Revealed as a rhetorical device, the phrase "concession to human frailty" is not a part of the solution but is rather a part of the problem in assessing the proper place for the provocation doctrine in Anglo-American criminal jurisprudence. So long as judges and policymakers continue to rely on this platitude in explaining the defense's purpose, the law of provocation will be hopelessly set without normative guidance, subject to constant drift.

VI. CONCLUDING REMARKS

No fewer than five distinct proposals for the proper formulation of a provocation defense exist in English and American law. Attempts to choose from these alternatives based on which achieves the most appropriate interplay with diminished capacity, which is the most philosophically coherent, or which confines the jury's discretion most correctly ultimately cannot succeed without a clear conception of the defense's objective. Although the traditional refrain that it is a "concession to human frailty" offers the most alluring vision of its place, this phrase is likely more harmful than it is helpful in guiding the doctrine's evolution.

The English and American experiences may nonetheless prove salutary. Differences among the various formulations of

270. LAW COMM'N, PARTIAL DEFENCES REPORT, *supra* note 23, at 33.

271. *See id.*

the defense reveal that they can be seen conceptually as lying along a continuum based on the degree of subjectivity they allow in evaluating the defendant's provoked response. This continuum indicates several properties of a provocation formulation, including the degree to which it interacts with the diminished capacity defense, its philosophic assumptions, its hermeneutic soundness, and the amount of jury discretion it affords. Given normative visions of each of these properties, the continuum can identify where trade-offs may occur as one travels between its two endpoints, thus allowing policymakers to find a point striking the proper balance.

Most of all, these experiences underscore the imperative that provocation be rooted in a clear, concrete vision of where the defense fits within the broader framework of the criminal law. Myriad such visions exist in the academic literature.²⁷² Psychological research can also guide this process by, for instance, shaping an informed understanding of how human emotion affects reason.²⁷³ Any attempt to redefine provocation should also involve critical thought regarding the criminal law's general attitude toward and treatment of emotion in assessing culpability.²⁷⁴ The English Law Commission's report on partial defenses to murder represents one tangible effort that has already been made toward this directive.²⁷⁵ Those on both sides of the Atlantic would do well to heed this example in reshaping the provocation defense.

272. See generally, e.g., Dressler, *supra* note 24 (advocating for provocation as an affirmative defense, based on partial excuse theory and unrelated to diminished capacity, focusing on impaired capacity for self-control); see also Ashworth, *supra* note 96, at 970 (criticizing Privy Council in *Holley* for failure to engage with academic response to *Morgan Smith* decision).

273. See Nourse, *supra* note 25, at 1390-91 ("In the past two decades, the idea of emotion as the natural enemy of reason has been seriously questioned by brain scientists and psychologists, by rhetoricians and philosophers, by classicists and even by legal scholars.") (citing research on subject); Mackay & Mitchell, *supra* note 216, at 48-50.

274. See Mackay & Mitchell, *supra* note 216, at 49 (noting mechanical and evaluative theories regarding the role of emotion in controlling criminal conduct); see also generally Jeremy Horder, *Cognition, Emotion, and Criminal Culpability*, (1990) 106 L.Q.R. 469 (arguing for theory of culpability that considers, and is sensitive to, desires associated with emotions moving criminal defendants).

275. See generally LAW COMM'N, PARTIAL DEFENCES REPORT, *supra* note 23.